Supreme Court, U.S.
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No. 06-531

IN THE

Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Petitioners,

v.

T. A. WYNER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

	Page
United States District Court , Southern District of Florida, Relevant Docket Entries	1
United States Court of Appeals, Eleventh Circuit, Relevant Docket Entries	8
Verified Complaint, *Wyner* v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. filed Feb. 12, 2003)	10
Emergency Motion, *Wyner* v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. filed Feb. 12, 2003)	32
TRO Hearing Transcript, *Wyner* v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. Feb. 13, 2003)	35
Wyner v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. Apr. 14, 2003) (order denying motion to dismiss)	98
Summary Judgment Hearing Transcript, *Wyner* v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. Jan. 21, 2004)	100
Wyner v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. Jan. 28, 2004) (final judgment)	145

NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioners' Appendix to the 06-531 Petition For A Writ Of Certiorari at the following pages.

Wyner v. *Struhs*, No. 04-14750-CC (11th Cir. July 17, 2006) (order denying rehearing and rehearing en banc) 49a-50a

Wyner v. *Struhs*, 179 Fed. App'x 566 (11th Cir. 2006)..... 1a-8a

Wyner v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. Jan. 28, 2004) (order on motions for summary judgment) 23a-48a

Wyner v. *Struhs*, 254 F. Supp. 2d 1297 (S.D. Fla. 2003) (corrected order granting motion for preliminary injunction)..... 9a-22a

The following document has been omitted in the printing of this Joint Appendix. It may be found in the Respondents' Appendix to the 06-531 Brief In Opposition To Petition For A Writ Of Certiorari at the following pages.

Wyner v. *Struhs*, No. 9:03-cv-80103-DMM (S.D. Fla. Aug. 16, 2004) (omnibus order)..... 1a-13a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach)

[Filed 02/12/2003]

Case No. 9:03-cv-80103-DMM

T.A. WYNER, GEORGE SIMON,
Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
02/12/2003	1	VERIFIED COMPLAINT filed; FILING FEE $150.00 RECEIPT # 717717; Magistrate Judge Linnea R. Johnson (Former Deputy Clerk) (Entered: 02/13/2003)
		* * * *
02/12/2003	4	EMERGENCY MOTION by T. A. Wyner, George Simon for temporary restraining order, and/or for preliminary injunction (Former Deputy Clerk) (Entered: 02/13/2003)
02/12/2003	5	MEMORANDUM by T. A. Wyner, George Simon in support of [4-1] motion for temporary restraining order, [4-2] motion for preliminary injunction (Former Deputy Clerk) (Entered: 02/13/2003)

DATE	NO.	PROCEEDINGS
		* * * *
02/12/2003	7	NOTICE of Hearing: Motion hearing before Judge Donald M. Middlebrooks set for 2:00 2/13/03 for [4-1] motion for temporary restraining order, set for 2:00 2/13/03 for [4-2] motion for preliminary injunction (Former Deputy Clerk) (Entered: 02/13/2003)
02/13/2003	8	ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION:ORDER granting [4-1] motion for temporary restraining order, granting [4-2] motion for preliminary injunction (Signed by Judge Donald M. Middlebrooks on 2/13/03) [EOD Date: 2/13/03](Former Deputy Clerk) Modified on 02/24/2003 (Entered: 02/13/2003)
		* * * *
02/27/2003	11	CORRECTED ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION: CORRECTED ORDER amending [8-1] order. Motion for Preliminary Injunction is granted. The parties have agreed that security is not necessary in this instance and therefore none will be required (Signed by Judge Donald M. Middlebrooks on 2/27/03) [EOD Date: 2/28/03] (Former Deputy Clerk) (Entered: 02/28/2003)
03/05/2003	12	Transcript filed re: TRO Hearing held 2/13/03 before Judge Donald Middlebrooks Volume #: 1 Pages: 1-90 (Former Deputy Clerk) (Entered: 03/05/2003)

DATE	NO.	PROCEEDINGS
03/25/2003	13	MOTION by David B. Struhs, Terence Coullitte to dismiss count II of plaintiffs complaint (Former Deputy Clerk) (Entered: 03/26/2003)
		* * * *
03/25/2003	15	Answer and affirmative defenses by David B. Struhs, Terence Coullitte (Attorney James Orrin Williams Jr.),; jury demand (Former Deputy Clerk) (Entered: 03/26/2003)
		* * * *
04/14/2003	17	ORDER ON MOTION TO DISMISS denying [13-1] motion to dismiss count II of plaintiffs complaint is DENIED AS MOOT. (Signed by Judge Donald M. Middlebrooks on 4/14/03) [EOD Date: 4/14/03] (at, Deputy Clerk) (Entered: 04/14/2003)
		* * * *
11/17/2003	45	MOTION with memorandum in support by David B. Struhs for summary judgment (Former Deputy Clerk) (Entered: 11/18/2003)
		* * * *
12/08/2003	55	MOTION with memorandum in support by T. A. Wyner, George Simon for summary judgment (kw, Deputy Clerk) (Entered: 12/09/2003)

DATE	NO.	PROCEEDINGS
12/08/2003	56	NOTICE of filing exhibits and deposition excerpts in support of plaintiffs' motion for summary judgment and in oppostiion [sic] to defendants' motion for summary judgment, by T. A. Wyner, George Simon (Former Deputy Clerk) (Entered: 12/09/2003)
12/08/2003	57	Statement of material undisputed facts in support, by T. A. Wyner, George Simon re: [55-1] motion for summary judgment (Former Deputy Clerk) (Entered: 12/09/2003)
12/08/2003	58	RESPONSE by T. A. Wyner, George Simon in opposition to [45-1] motion for summary judgment (Former Deputy Clerk) (Entered: 12/09/2003)
		* * * *
12/29/2003	69	MEMORANDUM by David B. Struhs, Terence Coullitte in opposition to [55-1] motion for summary judgment (Former Deputy Clerk) (Entered: 12/30/2003)
		* * * *
01/12/2004	77	REPLY by T. A. Wyner, George Simon to response to [55-1] motion for summary judgment (kw, Deputy Clerk) (Entered: 01/13/2004)
		* * * *

DATE	NO.	PROCEEDINGS
01/28/2004	83	ORDER ON MOTIONS FOR SUMMARY JUDGMENT: ORDER granting in part, denying in part [45-1] motion for summary judgment, denying [55-1] motion for summary (Signed by Judge Donald M. Middlebrooks on 1/28/04) [EOD Date: 1/28/04] (Former Deputy Clerk) (Entered: 01/28/2004)
01/28/2004	84	FINAL JUDGMENT for David B. Struhs, Terence Coullitte against T. A. Wyner, George Simon. The Court retains jurisdiction for the purpose of awarding costs and fees, including those expended on the motion for Preliminary Injunction upon which plaintiffs prevailed. It is further ordered, that the Clerk of Court shall close this case and all pending motions are denied as moot (Signed by Judge Donald M. Middlebrooks on 1/28/04) [EOD Date: 1/29/04] (Former Deputy Clerk) (Entered: 01/29/2004)
		* * * *
02/11/2004	85	MOTION by David B. Struhs, Terence Coullitte to alter or amend [84-1] judgment order (Former Deputy Clerk) (Entered: 02/12/2004)
02/25/2004	86	RESPONSE by T. A. Wyner, George Simon to [85-1] motion to alter or amend [84-1] judgment order (kw, Deputy Clerk) (Entered: 02/25/2004)
		* * * *

DATE	NO.	PROCEEDINGS
02/27/2004	89	MOTION by T. A. Wyner, George Simon for attorney fees , and reimbursement of litigation expenses (kw, Deputy Clerk) (Entered: 03/01/2004)
02/27/2004	90	MEMORANDUM by T. A. Wyner, George Simon in support of [89-1] motion for attorney fees, [89-2] motion reimbursement of litigation expenses (kw, Deputy Clerk) (Entered: 03/01/2004)
		* * * *
03/08/2004	93	REPLY by David B. Struhs, Terence Coullitte to response to [85-1] motion to alter or amend [84-1] judgment order (Former Deputy Clerk) (Entered: 03/09/2004)
		* * * *
03/23/2004	97	OPPOSITION by Terence Coullitte, David B. Struhs to [89-1] motion for attorney fees, [89-2] motion reimbursement of litigation expenses (at, Deputy Clerk) (Entered: 03/24/2004)
		* * * *
04/07/2004	101	REPLY by T. A. Wyner, George Simon to response to [89-1] motion for attorney fees (kw, Deputy Clerk) (Entered: 04/07/2004)

DATE	NO.	PROCEEDINGS
08/16/2004	102	OMNIBUS ORDER granting in part, denying in part [85-1] motion to alter or amend [84-1] judgment order. The Clerk of COurt [sic] shall enter judgment in favor of the plaintiffs and as against defendsnts [sic] for $25,924.50 representing attorneys' fees (Signed by Judge Donald M. Middlebrooks on 8/16/04) [EOD Date: 8/18/04] (Former Deputy Clerk) (Entered: 08/18/2004)
09/14/2004	103	NOTICE OF APPEAL by David B. Struhs, Terence Coullitte of [102-1] order, [84-1] judgment order EOD Date: 8/18/04 and 1/29/04; Filing Fee: $ 255.00; Receipt #: 531921 Copies to USCA and Counsel of Record. (Former Deputy Clerk) (Entered: 09/14/2004)

* * * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

04-14750-CC

T. A. WYNER, GEORGE SIMON,
Plaintiffs-Appellees,

versus

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants-Appellants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * *
04/25/2006	Judgment Entered
04/25/2006	OPIN1A (Notice of issuance of opinion) issued. Costs taxed against the Defendants-Appellants. c:Barbara Jeanne Taggart; c:Carri S. Leininger; c:Donald M. Middlebrooks; c:James K. Green; c:Randall C. Marshall
	* * * *
05/16/2006	Petition for Rehearing En Banc: (Atty: Carri S. Leininger)—David B. Struhs
07/17/2006	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED

DATE	PROCEEDINGS

* * * *

01/16/2007 Certiorari Granted S Ct # 06-531: (Atty: Carri S. Leininger)—Terence Coullitte

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO: 03-8103

T.A. WYNER and GEORGE SIMON,

Plaintiffs,

vs.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.

VERIFIED COMPLAINT

Plaintiffs, T.A. WYNER and GEORGE SIMON, sue defendants, DAVID B. STRUHS and TERENCE COULLITTE and allege:

INTRODUCTION

1. By this action, Plaintiff T.A. Wyner seeks intervention from this Court to prevent state park officials from arresting her or otherwise interfering with her peaceful, expressive activity at a state park, merely because it contains some innocent, non-erotic nudity. Her expressive activities and those of her allies at this park have, in the past, always been peaceful. Nevertheless, they have triggered arrests and spawned various civil rights actions and appeals.

2. From 1995 until now, defendants acknowledged in a court settlement that that nudity coupled with expressive activity is protected by the First Amendment. *See* Stipulation

for Settlement, *Simon v. DeWald*, attached as Exhibit 1. Late last week, however, defendants disavowed that agreement. Plaintiff Wyner is thus situated "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [s]he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)(federal court intervention is appropriate in circumstances such as this). Specifically, Plaintiff Wyner wants to engage in peaceful, expressive activity similar to that which she has engaged in the past at McArthur Beach State Park, but wants to avoid being arrested by defendants, whose predecessors have arrested her for such activity in the past. And, pursuant to his Stipulation for Settlement with Defendants wherein they recognize that nudity coupled with expressive activity is protected by the First Amendment, Plaintiff Simon wants to witness Plaintiff Wyner's expressive activity.

3. Plaintiffs jointly challenge the customs, policies, and practices of the Florida Department of Environmental Protection ("DEP"), and its employees, in denying persons their First Amendment and state constitutional rights of free expression and to receive information and participate in plays or other expressive conduct conducted in a public forum.

4. All acts material hereto occurred in Palm Beach County, Florida.

5. At all material times hereto, defendants were acting under color of state law.

JURISDICTION

6. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343, providing for jurisdiction without regard to the amount in controversy in cases seeking redress from alleged infringement of civil rights; pursuant to 28 U.S.C. §1331, providing for jurisdiction in cases arising under the Constitution and laws of the United States; and pursuant to 28

U.S.C. §§ 2201 and 2202, providing for declaratory and injunctive relief. This case arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983, creating a federal cause of action for violations of these civil rights.

PARTIES

7. Plaintiff T.A. Wyner, ("Ms. Wyner"), was at all material times hereto a resident of St. Lucie County, Florida.

8. Plaintiff George Simon ("Mr. Simon"), although currently a resident of Maui, Hawaii, was a previous resident of St. Lucie County, Florida. Mr. Simon desires to attend the protest activities that underlie this litigation.

9. Defendant David B. Struhs, was at all material times hereto the Secretary of the Florida Department of Environmental Protection ("DEP"), a department, agency, or subdivision of the State of Florida, and is responsible for administering, regulating, and controlling the operation of the public parks including the John D. MacArthur Beach State Park, pursuant to Section 258.004, Florida Statutes. Secretary Struhs is sued in his official capacity for injunctive and declaratory relief only.

10. Defendant Terence Coulliette, was at all material times hereto a park manager employed by the DEP. The park that he manages is located in Palm beach [sic] County, Florida, and is the site of the expressive activity. He is sued in his individual capacity for damages and in his official capacity for injunctive and declaratory relief.

FACTS

11. Plaintiff Wyner has a long history of expressive conduct within the John D. MacArthur Beach State Park, which the Eleventh Circuit has previously determined is a public forum. *See Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir. 1992).

12. Similarly, plaintiff Simon has a long history of being present in the audience when such expressive conduct was engaged in by Ms. Wyner and others, and has served as a videographer during such the performance of such expressive conduct.

13. Such expressive conduct has included nudity in the production of plays and in protests within the park.

14. For example, in July 1990, Ms. Wyner and a group of supporters went to John D. MacArthur State Park to conduct a peaceful demonstration on a public beach. Ms. Wyner intended through her protest to challenge recently adopted Departmental regulations which purported to prohibit beachgoers from exercising their rights under the First Amendment to leaflet, collect petitions, assemble peacefully, and speak on matters of public concern, and which regulated bathing attire.

15. Ms. Wyner and her supporters went to a remote and largely deserted area of the beach and gathered near the dune line, away from others who were using the beach. Out of respect for the privacy of other beachgoers, she first asked whether her presence would annoy or offend anyone. She then explained that she and her supporters had come to exercise the rights protected by the First Amendment. She distributed several copies of the Bill of Rights, asking the recipients to take care not to litter the beach. She solicited the signatures of those within earshot for a petition "encouraging legislators . . . to make no law abridging freedom of speech. . ." At Ms. Wyner's invitation, other beachgoers came forward to peacefully speak in opposition to state regulation of free expression. Some of the speakers objected to the state's ban on nude sunbathing at what they believed to have always been a clothing optional beach.

16. Throughout the assembly, Ms. Wyner and those who accompanied her spoke peacefully, sometimes humorously, but always orderly, never causing, threatening or encouraging

a breach of the peace. As the demonstration progressed, Ms. Wyner invited beachgoers to come forward to show their bathing suits as a means of protesting the content of Departmental bathing attire regulations.

17. After explaining to the assembled group that she depended on the Bill of Rights to protect her from violating the Departmental regulations, Ms. Wyner removed her t-shirt, revealing an opaque rectangular copy of the Bill of Rights extending from above her nipples and below her genitalia, and stars covering portions of her buttocks.

18. Dozens of law enforcement officers summoned by the former Park Manager accompanied Ms. Wyner, traveling on foot, on horseback, in motorized vehicles, and in a helicopter. Several seconds after Ms. Wyner displayed the Bill of Rights as her bathing attire, she was arrested and charged with disorderly conduct. A county court judge subsequently dismissed the charge for lack of probable cause.

19. Following the dismissal of the disorderly conduct for lack of probable cause, Ms. Wyner sued for damages in state court for violation of her First and Fourth Amendment rights, and was awarded damages by a jury only to lose them on appeal, based upon an appellate court determination that park officials were entitled to qualified immunity. *See DeWald v. Wyner*, 674 So.2d 836 (Fla. 4 DCA 1996).

20. Similarly, in 1991, Ms. Wyner was arrested for nudity in a public place while performing in a play, *MacArthur: The Man and the Beach*, in the historically clothing optional section of MacArthur Beach. Ms. Wyner was also the director of the play.

21. The play was an artistic, theatrical and audience participatory performance documenting the history of Palm Beach County's clothing optional beach and John D. MacArthur, the man who donated the beach to the State of Florida.

22. The charges brought against Ms. Wyner and others were dismissed.

23. In 1995, plaintiffs Wyner and Simon, a member of the audience, instituted actions in the Palm Beach County court, *T.A. Wyner v. DeWald, et al.*, Case No. MC-95-720, and *George Simon v. Laura DeWald, et al.*, Case No. MC-95-2659, alleging that their constitutional rights had been violated by the 1991 arrest and consequent interruption of the play.

24. By stipulation dated May 12, 1995, the DEP defendants settled the Simon action by, *inter alia*, stipulating that "[w]hile defendants do not condone or encourage nudity at John D. MacArthur Beach State Park, they recognize that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." *See* Stipulation for Settlement, *Simon v. DeWald*, attached as Exhibit 1.

25. The stipulation then set out a reasonable manner for the play to again be presented at MacArthur Beach State Park.

26. From 1988 through 2002, Ms. Wyner produced or acted in plays, demonstrations, performances and protests in MacArthur Beach State Park, including innocent nudity in combination with other forms of political and artistic expression, with constant threat of arrest by defendants or their predecessors in office, but with no actual arrests since 1991.

27. During that period of time, there was no interruption to, or adverse effect upon, the efficient operation of the Park as a result of any nudity involved in Ms. Wyner's expressive conduct.

28. Although at one time defendant DEP (or its predecessor) required a permit to engage in expressive conduct in MacArthur Beach State Park, no permit is currently required.

29. Rather, Florida Administrative Code 62D-2.014(18) provides:

> Free Speech Activities. Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

30. In mid-January, 2003, Ms. Wyner called defendant Coulliette to let him know of her intent to engage in a peaceful demonstration during the annual Winter Naturist Gathering in Palm Beach County which would include the creation of a temporary art installation comprised of nude bodies in the form of a peace sign. The demonstration is scheduled for February 14, 2003 (Valentine's Day). It is Ms. Wyner's intention to produce and direct the image.

31. After discussing her plans with his supervisor, Mr. Coulliette telephoned Ms. Wyner and asked that she repeat her plans in writing. She did so by e-mail, a copy of which is attached as Exhibit 2.

32. Mr. Coulliette responded by e-mail, explaining that he would forward the letter to Mr. George Jones, Bureau Chief, Parks District Five for his review. A copy of Mr. Coulliette's e-mail message is attached as Exhibit 3.

33. By letter dated February 6, 2003, Mr. Coulliette informed Ms. Wyner that DEP had concluded that the nudity

involved in the planned demonstration was not "expressive conduct protected by the First Amendment," and that even if it were, DEP was implementing a "reasonable manner restriction" prohibiting any nudity and requiring adherence to the clothing requirements of the Department's bathing and swimming regulations. A copy of the letter is attached as Exhibit 4.

34. Plaintiff desires to engage in expressive conduct on Valentine's Day, February 14, by producing, directing, and participating in the display of a temporary art installation c[illegible]prised of nude bodies in the form of a peace sign.

35. Because of the Department's past actions, including but not limited to Ms. Wyner's arrest and those of others for engaging in expressive activities, and defendants' position outlined in the February 6 (Exhibit 4) letter, Ms. Wyner fears that she will be arrested for engaging in such expressive conduct or that defendants and/or their employees or agents will interfere with her peaceful protest.

36. Plaintiff Simon desires to observe the peaceful protest on February 14, 2003, and has purchased an airline ticket to travel from his home in Hawaii to Fort Lauderdale, Florida, so that he can be present. However, Mr. Simon desires to view the protest and display in an uncensored form.

37. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs herein alleged. Plaintiffs are now suffering and will continue to suffer irreparable injury from Defendants' acts, policies and practices unless they are granted the relief prayed for herein. Plaintiff Wyner intends to conduct expressive activity in the future at this park which will include non-erotic displays of nude bodies. Defendants' reneging upon their 1995 settlement chills Ms. Wyner's future plans.

COUNT I

(Violation of First and Fourteenth Amendment Rights)

38. Plaintiffs reallege and adopt paragraphs 1 through 37 as if fully set forth herein.

39. Defendants' stated requirements outlined in their February 6, 2003, letter deprives Plaintiffs of their rights guaranteed by the First and Fourth Amendments to the United States Constitution.

40. Defendants' stated requirements outlined in their February 6, 2003, letter operates as an unconstitutional prior restraint upon plaintiff Wyner's protected expressive activities.

41. Florida Administrative Code 62D-2.014(18) vests unfettered discretion upon the Park Manager to restrict constitutionally protected expressive activities in MacArthur Beach State Park and such discretion is not circumscribed by any standards.

42. Defendants' actions are with deliberate indifference and reckless disregard towards Plaintiffs and other participants and observers in denying them the right to engage in constitutionally protected expressive activities and the right to receive uncensored information.

43. 42 U.S.C. Section 1983 provides a remedy for Defendants' actions.

WHEREFORE, Plaintiffs demand judgment against Defendants for:

(a) injunctive relief prohibiting defendants from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003;

(b) declaratory relief that defendants' actions constitute an improper prior restraint in violation of the First and Fourteenth Amendments to the U.S. Constitution;

(c) declaratory relief that Florida Administrative Code 62D-2.014(18) is unconstitutional both upon its face and as applied to plaintiffs;

(d) injunctive relief prohibiting defendants from interfering with future expressive activities that may include non-erotic displays of nude human bodies;

(e) compensatory damages against defendant Coulliette individually;

(f) nominal damages against defendant Coulliette individually;

(g) punitive damages against defendant Coulliette individually; and

(h) attorneys' fees and costs pursuant to 42 U.S.C. Section 1988.

COUNT II

(Article I, Section 4 Claim Under the Florida Constitution)

44. Plaintiffs reallege and adopt paragraphs 1 through 37 as if fully set forth herein.

45. Article I, section 4 of the Florida Constitution states:

> Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

46. Defendants' policy, custom, and practice of limiting or otherwise interfering with expressive conduct that includes nudity within MacArthur Beach State Park violates Article I, Section 4 of the Florida Constitution.

WHEREFORE, plaintiffs respectfully request that this Court:

(a) award compensatory damages against defendant Coulliette personally;

(b) grant injunctive relief; and

(c) award such additional or alternative relief as may be just, proper and equitable.

Respectfully submitted,
/s/ [illegible]
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VERIFICATION

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct to the best of my personal knowledge and belief.

T.A. WYNER

By /s/ T.A. Wyner

Executed on February 12, 2003.

[Plaintiff's Exhibit 1]

IN THE COUNTY COURT, IN AND FOR
PALM BEACH COUNTY, FLORIDA.
CIVIL DIVISION

CASE NO. MC-95-2659-RB

GEORGE SIMON,

Plaintiff,

vs.

LAURA DE WALD, JOHN FILLYAW, RICHARD DOMROSKI and the DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

STIPULATION FOR SETTLEMENT

The parties, through counsel, hereby stipulate to settle this case as follows:

1. Defendants shall pay plaintiff the sum of Two Thousand, Five Hundred Dollars ($2,500.00) for damages and attorneys' fees and costs and plaintiff shall dismiss this action.

2. While defendants do not condone or encourage nudity at John D. MacArthur Beach State Park, they recognize that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner.

3. In an effort to coordinate expressive activities and to develop a cooperative relationship with defendants, plaintiff and his representatives, specifically including T. A. Wyner, hereby notify defendants that they intend to perform the play "MacArthur/The Man and the Beach" at John D. MacArthur Beach State Park on February 19, 1996 at the low tide closest to the noon hour or at a time to be agreed upon by the parties.

4. The play shall be performed at least 100 yards north of the northernmost boardwalk on the beach in an area from the dune line to the ocean.

5. Plaintiff and his representatives shall arrange for placement of a bolt of cloth in a semi-circle around the area where the play will be performed.

6. Plaintiff and his representatives may, at their sole discretion, erect two signs no larger than four (4) square feet each, advising beachgoers that a play will be performed within the cloth-enclosed theatre which includes nudity.

7. At least fourteen (14) days before the play, T.A. Wyner or her designee shall contact the park manager to provide a best estimate as to the number of participants and size of the audience in order to assist defendants in planning for the performance.

8. The event shall retain jurisdiction to enforce the terms and conditions of this agreement.

DATED this 12th day of May, 1995.

/s/ James K. Green
JAMES K. GREEN
JAMES K. GREEN, P.A.
One Clearlake Centre,
Suite 1503
750 Australian Avenue South
West Palm Beach, FL 33401
(407) 659-2029
(407) 655-1357 (Facsimile)
Counsel for Plaintiff Simon
and for T. A. Wyner

/s/ Arthur C. Wallburg
ARTHUR C. WALLBURG, Esq.
Assistant Attorney General
Office of the Attorney General
FL-01 The Capitol
Tallahassee, FL 32399-1050
(904) 488-1573
(904) 488-4472 (Facsimile)
Counsel for Defendants

[Plaintiff's Exhibit 2]

James K. Green

From:	TAWyner@aol.com
Sent:	Wednesday, January 29, 2003 7:36 AM
To:	terence.coulliette@dep.state.fl.us
Cc:	JamesKGreen@bellsouth.net; ranger33133 @yahoo
Subject:	Peaceful Assembly on MacArthur Beach

Dear Mr. Coulliette

In the spirit of cooperation, I phoned MacArthur Park two weeks ago to let you know of my plans to return to MacArthur Beach for a traditional peaceful demonstration, during the annual Winter Naturist Gathering in Palm Beach County. When you responded to my call, after returning from vacation, I explained my plans to date. After discussing my plans with your supervisor(s), yesterday you phoned to request that I repeat my plans in writing.

Friday, Valentine's Day, February 14, 2003, I plan to create a temporary art installation, comprised of nude bodies in the form of a peace sign. The installation will be located on the traditionally clothing optional section of AirForce/ MacArthur Beach.

Crew members will start arriving at the park at approximately 10:00 AM. Models will be positioned at approximately 11:30 AM and artists of multi-media (oil, photography, videography, live body cast sculpture and others) will document the installation until approximately 12:30 PM. The demonstration should be complete by 2:00 PM with most artists, models and crew departing the park.

Our long history on MacArthur Beach has included an acknowledgement by the 11th Circuit Court of Appeals that

the beach is a public forum, wherein therefore free speech cannot be prohibited. Our choice of mode of expression mirrors similar art installations by Salvador Dali and more recently the artist, Tunick, whose "bodyscapes" have been photographed in major cities all over the world and have been recognized as protected speech by the US Supreme Court.

I expect no more than 50 participants (artists, crew, models and audience) however I cannot predict nor be responsible for the number of people who choose that day to be in that public forum as a result of the art installation or otherwise.

I tried to gain information from your Nature Center as to the number of visitors scheduled for your daily nature tours or other events during the Winter Naturist Gathering and was told that there were no plans other than the daily nature walk and no group reservations for that day.

All of the above if offered in advance to express my intent to cooperate with you and DEP, even though I believe that the only permit I need to peacefully assemble in the public forum of MacArthur Beach is the First Amendment.

Please let me know what else I can do to make this a positive experience for you, your staff, my crew, artists, models and the public, while keeping the focus on the message of the art installation, "peace".

Sincerely,
T.A. Wyner
Theatre on the Beach
772.465-5658
tawyner@aol.com

[Plaintiff's Exhibit 3]

James K. Green

From: Coulliette, Terence [Terence.Coulliette@dep.state.us]
Sent: Wednesday, January 29, 2003 9:08 AM
To: TAWyner@aol.com
Cc: Jones, George; Jones, Daniel R.
Subject: RE: Peaceful Assembly on MacArthur Beach

Dear Ms. Wyner,

Thank you for taking the time to write this letter concerning your plans for the upcoming assembly on February 14th. I am sure that everything will work out fine, as we communicate effectively, and seek cooperation and understanding. As I mentioned on the telephone, I am forwarding your letter to Mr. George Jones, Bureau Chief, Parks District Five for his review, consideration and input. I will advise you as to any issues or concerns that may be brought to my attention. I do not anticipate any problems at this time.

Thank you for your patience and cooperation in this matter. I will be in touch as soon as I have further information. If I can be of further assistance, please let me know.

Sincerely,
Terry Coulliette, PMII
MacArthur Beach State Park

-------Original Message-------
From: TAWyner@aol.com [mailto:TAWyner@aol.com]
Sent: Wed 1/29/2003 7:35 AM
To: Coulliette, Terence
Cc: JamesKGreen@bellsouth.net; ranger33133@yahoo
Subject: Peaceful Assembly on MacArthur Beach

Dear Mr. Coulliette

In the spirit of cooperation, I phoned MacArthur Park two weeks ago to let you know of my plans to return to MacArthur Beach for a traditional peaceful demonstration, during the annual Winter Naturist Gathering in Palm Beach County. When you responded to my call, after returning from vacation, I explained my plans to date. After discussing my plans with your supervisor(s), yesterday you phoned to request that I repeat my plans in writing.

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All of the above if offered in advance to express my intent to cooperate with you and DEP, even though I believe that the only permit I need to peacefully assemble in the public forum of MacArthur Beach is the First Amendment.

Please let me know what else I can do to make this a positive experience for you, your staff, my crew, artists, models and the public, while keeping the focus on the message of the art installation, "peace".

Sincerely,

T.A. Wyner

Theatre on the Beach

772.465-5658

tawyner@aol.com

[Plaintiff's Exhibit 4]

[Logo]

Department of
Environmental Protection
John D. MacArthur Beach State Park
10900 State Road 703
North Palm Beach, Florida 33408
561-624-6950
February 6, 2003

Jeb Bush
Governor

David B. Struhs
Secretary

Ms. T. A. Wyner
#36
8800 Okeechobee Road
Ft. Pierce, Florida 34945

Dear Ms. Wyner:

After careful consideration, the Division of Recreation and Parks has made a decision on your request for time, place, and manner restrictions that will be applicable for your planned activities on February 14th, 2003 at John D. MacArthur Beach State Park. At this time, the Division does not believe that the nudity planned for your activities is expressive conduct protected by the First Amendment. However, even if this was not the case, the Division believes that it has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity as part of your demonstration is a reasonable manner restriction. You are of course free to conduct your activities, absent the nudity. You must wear the minimal amount of clothing in the Park as required by section 62D-2.014(7)(b), Florida Administrative Code, which I am informed you are well aware of. Recently the Division has made a decision that thong bathing suit bottoms are allowable attire under the rule. You should coordinate with the Park Manager to determine the most suitable location for your

activities. The activities are welcome during any hours the Park is open.

If you have any questions feel free to contact me at the above address or phone number.

Sincerely,

/s/ Terence Coulliette
TERENCE COULLIETTE,
Park Manager,

cc: Peter J. Scalco
George Jones

CIVIL COVER SHEET 03 - 80103 CIV-MIDDLEBROOKS

MAGISTRATE JUDGE JOHNSON

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

T.A. WYNER and GEORGE SIMON

DEFENDANTS DAVID B. STRUHS, in his official capacity as Secretary of the Florida Department of Environmental Protection, and TERENCE COULLETTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF St. Lucie (EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Palm Beach (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

03-80103-CV-DMM/LRJ

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

James K. Green, Esq.
JAMES K. GREEN, P.A.
(561) 659-2029
Ste. 1630
222 Lakeview Ave.
West Palm Bch. FL 33401

ATTORNEYS (IF KNOWN)

(d) CIRCLE COUNTY WHERE ACTION AROSE:
DADE, MONROE, BROWARD, PALM BEACH, MARTIN, ST. LUCIE, INDIAN RIVER, OKEECHOBEE, HIGHLANDS

II. BASIS OF JURISDICTION (PLACE AN X ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only)

(PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

§1983 action challenging park officials' restriction on expressive activity at state park

IVa. 3 days estimated (for both sides) to try entire case

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

A CONTACT	A TORTS	B FORFEITURE PENALTY	A BANKRUPTCY	A OTHER STATUS
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury ☐ 362 Personal Injury-Med Malpractice ☐ 365 Personal Injury-Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 610 Agriculture ☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs ☐ 660 Occupational Safety/Health ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Management Relations ☐ 730 Labor/Management Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Employee Ret. Inc. Security Act	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS-Third Party 26 USC 7609	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce/ICC Rates/etc. ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 810 Selective Service ☐ 850 Securities/Commodities/Exchange ☐ 875 Customer Challenge 12 USC 3410 ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☐ 950 Constitutionality of State Statutes ☐ 890 Other Statutory Actions*
A REAL PROPERTY	A CIVIL RIGHTS	B PRISONER PETITIONS		
☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 444 Welfare ☒ 440 Other Civil Rights	☐ 510 Motions to Vacate Sentence Habeas Corpus: ☐ 530 General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition		

* A or B

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated ☐ 5 Transferred from another district (Specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT CHECK IF THIS IS A ☐ UNDER F.R.C.P. 23 **CLASS ACTION** **DEMAND $** Check YES only if demanded in complaint: ☐ YES **JURY DEMAND:** ☒ NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 2/11/03 SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT
SD FLA
REV 9/94

FOR OFFICE USE ONLY: Receipt No. 117717 Amount: $150.00
Date Paid: _____ M/Mp: _____

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Feb. 12, 2003]

Case No. 03-80103

T.A. WYNER,

Plaintiff,

vs.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER and/or PRELIMINARY INJUNCTION

Pursuant to Fed.R.Civ.P. 65(a) and 65(b), plaintiffs move this Court for an order restraining defendants from requiring plaintiff Wyner, and/or other participants, to wear clothing when they participate in a Valentine's Day protest in John B. MacArthur Beach State Park, consisting, *inter alia*, of the formation of a temporary art installation comprised of nude bodies in the form of a peace sign. Because of the past history of defendants' interference with plaintiffs' constitutionally protected expressive activities in the park, plaintiffs further seek an order restraining defendants from any interference with the planned peaceful protest. Because the planned protest and expressive activities are scheduled for this Friday, February 14, 2003, plaintiffs request the Court, pursuant to S.D. Fla. L.R. 7.1E, to waive all time requirements and hold an immediate hearing on this motion.

Plaintiff Wyner has a long history of expressive conduct within the John D. MacArthur Beach State Park. The John D. MacArthur Beach State Park is a public forum. *See Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1522 (11th Cir. 1992). Such expressive conduct has included nudity in the production of plays and in protests within the park. By this action, Plaintiff T.A. Wyner seeks intervention from this Court to prevent state park officials from arresting her or otherwise interfering with her peaceful, expressive activity at the park, merely because it contains some innocent, non-erotic nudity, Her expressive activities and those of her allies at this park have, in the past, always been peaceful. Nevertheless, they have triggered arrests and spawned various civil rights actions and appeals.

From 1995 until now, defendants acknowledged in a court settlement that that nudity coupled with expressive activity is protected by the First Amendment. *See* Stipulation for Settlement, *Simon v. DeWald*, attached to the Verified Complaint as Exhibit 1, Late last week, however, defendants disavowed that agreement. Plaintiff Wyner is thus situated "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [s]he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (federal court intervention is appropriate in circumstances such as this). Specifically, Plaintiff Wyner wants to engage in peaceful, expressive activity similar to that which she has engaged in the past at McArthur Beach State Park, but wants to avoid being arrested by defendants, whose predecessors have arrested her for such activity in the past. And, pursuant to his Stipulation for Settlement with Defendants wherein they recognize that nudity coupled with expressive activity is protected by the First Amendment, Plaintiff Simon wants to witness Plaintiff Wyner's expressive activity.

Plaintiffs jointly challenge the customs, policies, and practices of the Florida Department of Environmental Protection ("DEP"), and its employees, in denying persons their First Amendment and state constitutional rights of free expression and to receive information and participate in plays or other expressive conduct conducted in a public forum.

In support of this Motion, plaintiff would call the Court's attention to the Verified Complaint and Memorandum In Support Of Plaintiffs' Motion, filed simultaneously with this Motion. A proposed order granting this Motion is also submitted for the Court's consideration.

Respectfully submitted,

/s/ James K. Green
James K. Green, Esq.
JAMES K. GREEN, P.A.
Suite 1630, Esperante'
222 Lakeview Ave.
West Palm Beach, FL 33401
Florida Bar No: 229466
(561) 659-2029
(561) 655-1357 (facsimile)

Cooperating Attorney for the American Civil Liberties Union Foundation of Florida, Inc. – Palm Beach Chapter

Randall C. Marshall, Esq.
American Civil Liberties Union Foundation of Florida, Inc.
4500 Biscayne Blvd., Ste. 340
Miami, FL 33137-3227
Florida Bar No: 0181765
(305) 576-2337
(305) 576-1106 (facsimile)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

CASE NO. 03-80103-CIV
West Palm Beach, Florida
February 13, 2003
2 o'clock, p.m.
Pages 1 to 90

T. A. WYNER & GEORGE SIMON,
Plaintiffs,

vs.

DAVID B. STRUHS, et al.,
Defendants.

TRANSCRIPT OF TRO HEARING
BEFORE THE HONORABLE DONALD MIDDLEBROOKS,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Plaintiffs: Randall C. Marshall, Esq.

For The Defendants: Maureen Malvern, Esq.
Christine Guard, Esq.
Jeffrey Collier, Esq.

Court Reporter: Roger Watford, RMR
Official Court Reporter.
West Palm Beach, Florida

[2] THE COURT: This is the case of T. A. Wyner versus David Struhs, in his capacity as Secretary of the Florida Department of Environmental Protection, and Terence Coullitte, individually and in his capacity as park manager of John D. MacArthur State Park. The Case number is 03-80103. Could I please have appearances starting with plaintiff.

MR. MARSHALL: Yes, Your Honor, my name is Randall Marshall. I am with the American Civil Liberties Union Foundation of Florida. With me is plaintiff T. A. Wyner.

THE COURT: Good afternoon.

Okay, I think we have people on the phone as well, do we not?

MS. MALVERN: That's correct, Your Honor, Maureen Malvern, for the defendants, and with me are—

MS. GUARD: Christine Guard.

MR. COLLIER: And Jeffrey Collier.

THE COURT: And you represent both defendants?

MS. MALVERN: Yes.

THE COURT: Okay. I got Ms. Guard, but who is the third person, Jeffrey—

MR. COLLIER: Jeff Collier, Your Honor.

THE COURT: Collier, okay. Good afternoon.

MR. COLLIER: Good afternoon.

[3] MS. MALVERN: Good afternoon.

THE COURT: Okay, yesterday we received a complaint and motion for temporary restraining order and/or preliminary injunction. In reviewing it we noted that the plaintiff wanted to or intended to be involved in a protest or some sort

of, we'll hear more about what exactly, but some sort of a display tomorrow morning.

And so, although that was exceedingly short notice, we went ahead and set a hearing and directed that both parties be notified so that we could get some briefing, I will say I guess I was disturbed somewhat about the short notice, given the imminence of the event. On the other hand, as I looked through the attachments to the complaint, it looked like the plaintiff has only had since about the 6th since she apparently got word that she couldn't do what she wanted to do. So, given that, we set this on short notice, but I do appreciate the parties responding so quickly.

I have read the, as I say, the verified complaint and its attachments, the motion filed by the plaintiff, as well as the memorandum that they filed, and I've also read a memorandum filed by the defendant, together with I believe all the cases both of you have cited, although I will tell you I haven't had hours and hours and hours to read them all. So that is where I [4] stand.

Let me hear from both parties as to what they would like to do in terms of this hearing, whether there are facts in dispute, and some idea of the time you would like. Since we have somebody on the phone, you need to make sure you are using a mike, and I don't know if you—if you need to come up closer because of this speaker, you are welcome to do it, both of you, if you would like to.

MR. MARSHALL: Let me try from the podium, Your Honor. Can the folks on the phone hear me okay?

MS. MALVERN: Not very well.

THE COURT: Well, the podium is somewhat tethered because it's attached into the the ground.

MR. MARSHALL: It may be easier for them to hear if I am sitting close to the mike.

THE COURT: Is that any better? I am a little bit—

MR. MARSHALL: I can come up to the front bench probably and be heard fairly well if I speak up.

THE COURT: That would be fine. And if your client would like to come too she can, it she would like, whatever you want to do,

MR. MARSHALL: Okay, T.A., you want to come up or at least move a little bit closer? How about from [5] this vantage point?

MS. MALVERN: Fine.

MR. MARSHALL: Okay. I tend to have a loud voice. I apologize in advance to Your Honor. At this point I am prepared to make a brief overview of what we hope to accomplish here today, and we are also prepared to put on T.A. Wyner as a witness to set the factual history and then more detail about the nature of what is planned tomorrow in order to show the Court why this is a protected First Amendment activity and why the defendants should be restrained.

So, if that is acceptable, Your Honor, I will go ahead and make a few brief opening comments.

THE COURT: Let me see what the defendants would like to do first.

MR. MARSHALL: Okay.

THE COURT: What did y'all have in mind?

MS. MALVERN: Well, we are pretty on short notice with this and we don't know much of what is going on, but, as far as I can tell, there probably aren't any disputed facts, it's just a question of whether a nudity ban can be enforced in this case, that's all.

THE COURT: So you don't plan to call—

MS. MALVERN: Nobody is objecting to their protest other than the fact that they are going to do it [6] nude.

THE COURT: And ycu don't then plan to call witnesses at this hearing?

MS. MALVERN: I doubt it unless somebody says something that somebody tells me that's, around this table, is incorrect.

THE COURT. Some of the people with you are, in addition to having lawyers, you have your program people?

MS. MALVERN: A couple of people.

THE COURT: Okay.

MS. MALVERN: One person really.

THE COURT: So from your standpoint you think it's going to be legal argument unless the plaintiff says something y'all think is wrong; is that right?

MS. MALVERN: Correct.

THE COURT: Okay.

MS. MALVERN: I am not aware of any factual disputes.

THE COURT: Okay. Why don't we then proceed. And how long do both sides want? How long do you think you want, Mr. Marshal?

MR. MARSHALL: I believe that with the witness and a brief introduction and argument afterward I think we can easily be done in 45 minutes to an hour, if that.

[7] MS. MALVERN: You have to speak up a little, sorry.

MR. MARSHALL: I apologize, I believe Ms. Wyner would take approximately 30 to 45 minutes and then, with 15 minutes of argument, plaintiffs would need about an hour total.

MS. MALVERN: Is there any way we could find out whether there really are some disputed facts?

MR. MARSHALL; If I could, Your Honor, I, part of the problem here is this is not written on a clean slate, and I will just proffer Ms. Wyner's testimony that, although her actions began prior to 1990, in 1990 she was arrested for disorderly conduct at the MacArthur Beach State Park when—

THE COURT: If you want to sit in that witness chair, so at least you have a place to sit, feel free to do that.

MR. MARSHALL: Thank you, Your Honor.

MS. MALVERN: I guess we might as well let your witness testify.

THE COURT: Well, he's going to give us a brief summary. She came up and was sitting in the witness chair because it's closer to the speakerphone, so she's already in the witness chair if it's necessary.

MR. MARSHALL; The basis of that arrest was [8] that Ms. Wyner had held an image of the Bill of Rights that covered her breasts and her pubic area and had two stars on each of her buttocks and she was arrested under the nudity regulation in the park. Those charges were ultimately dismissed.

In 1991, the very next year, Ms. Wyner put on a theatrical production at the park that involved a history of the park and what they believed to be a historically clothing optional section of that park. During that play there were moments of innocent nonerotic nudity that appeared in the the play and she was arrested for indecent exposure. That charge was also dismissed.

Shortly after that Ms. Wyner and George Simon, the other plaintiff in this action who is in Hawaii and on his way here, filed suit in state court that ultimately resulted in a stipulation, Exhibit 1 to the verified complaint, wherein these defendants

stipulated that nudity combined with expressive conduct was protected under the First Amendment and permitted, if you will, the play to go on in 1996.

Ms. Wyner would testify that in 1996 the play did go on without any screens, without any putting off of separating themselves from the rest of the park, that there were moments of innocent nonerotic nudity, there [9] were no problems, there were no arrests.

In 1999 the play was put on again but this time the defendants erected a screen to separate where the play was being done from the rest of the public there. In the year 2000 the department distributed signs around the park saying that there would be a play that there would he nudity involved, but the courts had determined that this was protected activity and that if you were offended by the nudity this is where the play was going to be and you could stay out.

Then starting around, again around 2000 through 2001, there was very, various correspondence between Ms. Wyner and the department in which the department again began to threaten the arrest of individuals for violation of the nudity regulation in the park. And we would show that the nudity regulation is related to bathing and swimming in the park.

Finally, this year she, as she always has done, notified the defendant in advance of expressive activity to take place in the park that would include innocent nonerotic nudity and this year it was going to be in conjunction with an anti-war demonstration that would include the image of a peace symbol composed of nude bodies. She attempted to arrange with the park in advance to make sure that it was a convenient time, a [10] convenient place and would not interfere with the park.

In short, we believe her testimony would show that there have been continual displays of innocent nonerotic nudity at MacArthur Beach State Park, that it has caused no material

disruption or disruption at all to the efficient operation of the park, with the exception of actions by the defendants in threatening to arrest and in chilling the participation of the audience in the production.

And then she would also testify about the significance of the, not only the artistic but the anti-war message involved in the peace symbol composed of nude bodies, that this, in fact, this method of demonstration has become the image of anti-war protests in this era of individuals protesting against the impending war with Iraq and seeking peace in a noncombative way, that the image of the nude bodies conveyed a sense of vulnerability of those who are participating, and that the participants are clearly unarmed in the action that they are doing because there's nothing that is hidden from the view of the public.

This would, in essence, be the testimony that Ms. Wyner would put on. There are additional documents to substantiate the threats of arrests in the past to [11] substantiate that we don't write on a clean slate in terms of what's about to occur tomorrow.

MS. MALVERN: That's it?

MR. MARSHALL: Yes, that would be her testimony fleshed out in more detail.

MS. MALVERN: I'm not sure that we have any conflicts with that. Do we dispute any of that? I mean we dispute that the only way to do a war protest is nude, but I don't think that's a matter of fact exactly, so I, you know, that is a matter of opinion. I don't think that, as far as I can tell, that she really needs to put on that testimony because I believe, as far as previous events are concerned, those are correct events. That's my understanding.

MR. MARSHALL: Okay. And so long as the state defendants are agreeing that there have been continued threats of potential arrests, we have no problem with that.

MS. MALVERN: I don't know how continued they were. There were some letters saying that the park service intended to enforce the nudity ban. I believe that's correct.

MR. MARSHALL: And that it could subject them to arrest for violation of that ban?

MS. MALVERN: Violation of a park rule can do [12] that.

MR. MARSHALL: Okay.

THE COURT: I think I would like to hear from her at least briefly on some of what—I want to understand what has gone on in the past and have a little more detail about what exactly it is she plans to do. It wasn't clear to me entirely from the papers.

I also think I saw last night, when I got home I read my Palm Beach Post and I thought there was a brief mention, and it may be of something else, concerning this, that, and so I wanted to—I wasn't clear on how many people were going to be involved. The papers make it sound like only a few. The newspaper made it sound like—it wasn't clear to me from that.

MR. MARSHALL: Okay. I would be happy to go and have Ms. Wyner sworn in and try and flesh out some of that in as brief a fashion as possible.

THE COURT: Okay, thank you.

Ms. Malvern, you've got copies of all the materials they filed, correct? You have their claim and attachments and their memo?

MS. MALVERN: We do I believe, yes.

THE COURT: Okay.

TONY ANN WYNER, PLAINTIFF WITNESS, SWORN

DIRECT EXAMINATION

[13] BY MR. MARSHALL:

Q. Please state your name.
A. Tony Ann Wyner.
Q. Okay. And what do you normally go by?
A. T.A.
Q. Okay.

MS. MALVERN: Excuse me. I can't hear the witness.

THE WITNESS: Tony Ann Wyner. I usually go by T.A.

BY MR. MARSHALL:

Please tell the Court your background in terms of your professional or work responsibilities.

A. Well, I am 55 years old, I've been involved in—I have been a political activist since I was 14 years old involved in the anti-war program of the Vietnam era. I have been involved in production of theatrical productions of, street productions, all my life.

I currently produce an event for the City of Palm Beach Gardens as well as the City of Fort Pierce which is music, art and the encouragement of small scale farming. I have written several art and architecture tours for the City of Fort Pierce as well as the Audobon Society, the Conservation Alliance, the Jazz Society, those sorts of productions.

[14] Am I answering the question?

Q. Yes, I believe so.

Does all of the work that you do in terms of productions of an artistic and/or theatrical events involve nudity?

A. Not all, no.
Q. Okay, does some of them?

A. When the nudity is documented, you know, if nudity is part of the history that I am writing about, then nudity would be part of the production.

Q. Okay. Let's go to the John D. MacArthur Beach State Park, and, if you could, explain for the Court the first interaction you had in terms of doing anything at MacArthur Park.

A. In 1988 I was asked to organize what is considered to be a skinny-dippers' national holiday in July at MacArthur State Park because it has a history of being a clothing optional beach. When I went to organize that festival I was prohibited from distributing literature, flying a banner, circulating a petition and exhibiting artwork, which in that case was live body cast sculptures.

Those prohibitions resulted in a federal court case which ultimately went to the Eleventh Circuit, including the acknowledgment at the appeal level that MacArthur [15] Beach is a public forum and also challenging the codes that were used to restrict and prohibit expressive works, and—

MS. MALVERN: Could you speak up a little again.

THE WITNESS: What I said is that that court case resulted in the acknowledgment that MacArthur Beach is a public forum, it also acknowledged that the park regs that were used to prohibit or restrict that demonstration were at least used unconstitutionally.

BY MR. MARSHALL:

Q. Okay. That was 1988?

A. 1988. That was settled in—in 1995 was the final of that federal court case.

Q. Okay. What was the next incident in MacArthur State Park after that?

A. Well, again continuing, there's other things going on, we're having demonstrations, nothing is happening, however, in 1990 DEP changed the verbiage of some of their regs while I was still in federal court challenging them, so as a

protest to their changing the verbiage while the federal court case was ongoing I assembled, I organized a demonstration at MacArthur Beach State Park. I believe the report was five hundred people attended.

[16] And at that demonstration I invited people to speak against the regulations which included at that time a permit scheme, a content based permit scheme and permit reg. People were asked to speak, sing, play music. And then, in order to protest the, what we call the bathing suit code, which is still in effect, we asked people to show their bathing suits and ask the state park officials, who were assembled there, to sort of judge which of those bathing suits did or did not comply with the rule.

My own costume for that purpose was, not that I held up a Bill of Rights, the Bill of Rights was actually glued to my body covering all the parts the verbiage in the bathing suit code says to, and I was arrested for actually not the bathing suit code, that's what they said, I was actually arrested for disorderly conduct. I motioned Judge Evans to dismiss those charges, which he did, and then filed suit later on—

MS. MALVERN: Could you speak up again.

BY MR. MARSHALL:

Q. I'm sorry, what were you arrested for?

A. I was actually arrested for disorderly conduct. Those charges, that charge was dismissed, no, other charges were brought, and eventually I brought a civil suit as a result of those arrests.

[17] Q. Okay. That was 1990; is that correct?

A. That was 1990.

Q. Okay. What was the next incident at MacArthur State Park that you were involved in?

A. Again, let me just say that between the two incidents, if you want to talk about arrests, there were other demonstrations on the beach; for example, December 15th of 1990

there was a birthday celebration for the Bill of Rights on MacArthur Beach where there was some nudity, not on my own part, and there were no arrests even though they were in plain sight of rangers.

In 1991 I premiered the play that I wrote, "MacArthur, The Man, The Beach And The Skinny-Dippers." In that case I had several volunteers actually create a fabric screen, so to speak, around the stage and attempted to perform the play and myself and two cast members who were nude at the time were arrested for indecent exposure.

And also at the same time a member of the audience who was videotaping and fully clothed was also arrested for indecent exposure. Three of those—the three others besides myself had that charge nol-prossed. My own charge was dismissed.

And that also resulted in a civil court case which [18] we settled out of court and included the stipulation the name of my audience, because their First Amendment rights also were violated, and the name of George Simon, also in this case, and they also settled out of court with George Simon with the stipulation that, in essence, invited us back to the beach to perform the play in its entirety without incident, and we did so in 1996 with no arrests, with no screening and with the nudity.

Q. Ms. Wyner, the 1995 settlement that you are talking about, that was George Simon versus DeWald, that ended in a settlement that included the stipulation?

A. Correct.

Q. And that is what we appended as Exhibit 1 to the verified complaint?

A. I believe so.

Q. Okay. And now, that agreement did call for a screen, did it not?

A. The stipulation actually spoke about a screen.

Q. Okay. And was there a screen when the play was produced in 1996?

A. Not in '96.

Q. Were there any arrests?

A. Not at all.

Q. Was there any interference with anyone else at the park that you could tell?

[19] A. No.

Q. How many people were in attendance?

A. Over a hundred.

Q. Did the audience participate?

A. Yes.

Q. Could you explain to the Court what that participation was and how it fit into the play.

A. Well, since the play is a historic documentary, we actually, one of the characters is actually a time traveler and the time traveler asks people to go back in time when John D. MacArthur himself and his son Rod MacArthur was still living and the beach had its clothing optional tradition, and so in essence the extras, so to speak, in the audience, the audience becomes the extras, and the audience then portrays skinny-dippers of the time.

And so in that performance, in essence, most of the people on the beach were nude in the parts of the play where we depicted the era of the beach where it was hassle free to be clothing optional.

Q. When was the next, expressive activity or protest that you engaged in at MacArthur State Park after 1996?

A. I believe that, again things go on, in December the Bill of Rights, typically we will have something going on there, but I believe the next one is '98. In that [20] case I believe DEP again, because I let them know that we were coming to the beach, unknowing how many numbers there would be—

MS. MALVERN: Could you speak up again. I'm sorry.

THE WITNESS: I'm saying that again I did notify DEP because I am never certain how many people will be there. DEP at that time requested, actually offered to put up a screen, and since we had already had the stipulation and things were going so well, we decided to allow DEP to put up the screen and actually do the performance within the screen, which we did.

Again, there were no arrests; however, our conclusion after having done the play within the screen was that we had ghettoized the stage area and that the general public was in fear of coming beyond the so-called line in the sand and were in fear of coming beyond that line and the screen itself for fear of their being arrested, which people already knew about an audience member had been arrested, and so it actually chilled the performance, the screen, and we let DEP know that we could no longer use the screen. It took the performance out of the public forum.

THE COURT: By a screen, what are you talking about? I thought the stipulation provided for if DEP [21] wanted to, to put a screen around the thing so that if people didn't want to see it they weren't part of it but if they wanted to go around the screen they could see the play. Is that the kind of screen or are you talking about some sort of screen like you had in the first one which was some sort of gauzy screen, as I understood it?

THE WITNESS: They were fairly similar actually. The one that we used in '91 when the first arrest of the play occurred was fabric, and ours was actually probably a little mare opaque than theirs, but the one that they installed was somewhat gauzy fabric. And also recall, even though the stipulation did speak to the screen, we did not erect a screen for the '96 performance post stipulation.

THE COURT: Well, didn't the stipulation say that DEP could do the screen if they wanted to? I thought that's what it

said as opposed to requiring you to do it. I don't have it before me.

MR. MARSHALL: Let me look real quickly, Your Honor.

THE COURT: I remember it said DEP could use signs if it wanted and there was something about the screen.

(Pause)

MR. MARSHALL: Okay, it does say, Your Honor. [22] this is the second page of Exhibit 1, paragraph 5, "Plaintiff and his representative shall arrange for placement of a bolt of cloth in a semi-circle around the area where the play will be performed."

THE COURT: And that, in terms of the signs, it says DEP can use the signs?

MR. MARSHALL: Well, on the signs it says, "Plaintiff and his representatives may at their sole discretion erect two signs no larger than four square feet advising beach-goers that a play will be performed within the cloth enclosed theater which includes nudity."

So that the stipulation did cover the cloth to be done by the plaintiff and the plaintiffs could put up signs at their discretion.

THE COURT: Okay, thank you.

BY MR. MARSHALL:

Q. Let's go—that was 1999; is that correct?

A. I think that was '98.

Q. Okay. After 1998 when is the next year that you recall being in the park?

A. Well, I get a little confused myself, but I think—

MS. MALVERN: Louder again, please.

THE WITNESS: I'm sorry. I was just saying I [23] get a little confused myself. I believe in '99—

BY MR. MARSHALL:

Q. Well, if I could help here, 2000 is what I am going to get to in terms of park officials putting up signs.

A. Right.

Q. But the year prior, as you recall, was the play performed again with the department putting up a screen?

A. I believe the department only put up a screen once.

Q. Okay. So that would have been either 1999 or 1998?

A. Right.

Q. Okay. Now, I understand from your testimony that you and the participants were unhappy with the screen but was there any effect that you could tell upon the operation of the park as a result of the play and periods of nudity?

A. No, because, as is our tradition, we ask for reports of rangers of the day, and there were no incidents, including the numbers of people or parking or anything else.

Q. Do you take any steps in advance of productions you put on to inform other people in the vicinity that there may be nudity?

A. Absolutely. The prelude to every performance, whether it's a demonstration or a theatrical performance, is to make sure that everyone, first of [24] all, we use ushers and ask people as they enter the beach, because this is a huge park; as they enter the beach the ushers are instructed to let every individual that comes off the boardwalk know what is going on, know that there is going to be nudity, so that they can avert their eyes, they can go to a different part of the beach, or we will move.

In fact, what we normally do is ask anyone within earshot if we are even bothering them by our presence or our sound, even though we don't use a sound system, and then proceed if there are no objections.

Q. Ms. Wyner, could you for the Court describe the layout of MacArthur Beach State Park and where you ordinarily perform in relation to that layout?

A. Well, the park is huge and there is a long, I don't even know how long the boardwalk is from the nature center parking lot, rangers' facilities, etcetera, to the actual beach. The beach itself is 1.8 miles long. We typically go at least a quarter of a mile north again from the exiting, from the bottom of the boardwalk, so of course we are not in the path or in the way of anyone going on to or coming off of the boardwalk.

Q. Now, Ms. Wyner, in 2000 do you recall the department placing up posters around the park?

A. Yes. Actually, I think we included those copies [25] and those are direct copies that are actually the size.

Q. Okay. I am going to hand you what we have marked as Exhibit 5. I have an extra copy for the Court and for the benefit of those on the phone, let me—let me first ask Ms. Wyner if you will verify is this a poster that was distributed by park officials?

A. Actually, it was posted, and yes, it is.

MR. MARSHALL: It says, "Today John D. MacArthur Beach State Park will be the location of a play entitled "MacArthur, The Man, The Beach And The Skinny-dippers." As part of this production, nudity will he involved. The courts have determined that this activity is a protected expression under the First Amendment of the U.S. Constitution.

"The Florida Division of Recreation and Parks recognizes the constitutionality of this activity. The division also recognizes that this activity is not normally associated with traditional recreational use of our parks and that some of our visitors may wish to enjoy the beach and facilities of the park without the benefit of this production.

"As such, the park, in conjunction with the Florida Park Patrol, will provide screening, signage and personnel to advise all visitors of the exact location of this theatrical production."

[26] I would like to move for admission of Exhibit 5.

THE COURT: Do you have any objection?

MS. MALVERN: Judge, other than the fact we haven't seen a copy of it, that seems to be the gist of what was on those signs, but without seeing one it's a little hard to waive any objection we might have to it.

THE COURT: Okay. Well, I will tell you he read it accurately and it's, just as they have it here, two pieces of white paper with those words printed on it. So I am going to admit 5.

THE WITNESS: It actually was one full, one whole piece. It has been cut I guess for the file or something.

MR. MARSHALL: Okay,

BY MR. MARSHALL:

Q. Was there any interruption because of your production in the year 2000?

A. There has never been any disruption, any interruption, with anything else going on in the park.

Q. What's happened after the year 2000 in terms of—

THE COURT: Let me ask you, in 2000 was there a screen and who put it up?

THE WITNESS: There was no screen.

MS. MALVERN: We couldn't hear that answer.

[27] THE WITNESS: There was no screen in 2000.

THE COURT: She said there was no screen in 2000.

BY MR. MARSHALL: How about--

MS. MALVERN: Was there nudity? I'm sorry, Your Honor. Was there nudity in this one in 2000?

(Pause).

THE COURT: She's looking for her reading glasses right now.

THE WITNESS: If you could read this, this is a newspaper report, and I'm confused.

MR. MARSHALL: Okay. Ms. Wyner has handed me an article out of the Palm Beach Post with the date of February 21st, 2000, that I assume would refresh her memory without—well, let me just say what it represents in the newspaper article and then I will ask you if this is your recollection.

"The play was performed by activists in T-shirts and jeans. Park Manager Smythe had asked the group to perform behind a sand colored screen but Wyner refused, saying the screen had a chilling effect."

BY MR. MARSHALL:

Q. Does that refresh your recollection?

A. Yes. Okay, so what happened in that case is that DEP did put up a screen. Because we thought we had [28] already clarified that the screen had a chilling effect, we chose to perform outside the screen. But again when I start the plays I always let, of course, these are not actors, these are people that show up, they are given scripts as they show up as volunteers, so along with that they are told what the condition and status is of DEP.

In this case, now that I look at this, I also have a post performance report, which is something that I do personally, and it does refresh my memory that we chose to go outside the screen, we did the performance, and then it was up to the individual performer to choose to do their part in the typical fashion when it required nudity or not.

In some cases, I can recall in one particular case the woman who portrayed Belinda Maguire used a prosthetic breast over her own.

Does that answer it?

Q. Well, could you explain what, who is Belinda Maguire in the context of the play?

A. Belinda Maguire is a woman that was convicted and whose conviction was upheld for jogging top-free on MacArthur Beach in the early '80s.

Q. Okay. And so this person is part of the play?

A. That was part of the history, part of the play.

[29] Q. Okay. Following 2001, I mean 2000, what happened in terms of your putting on a play or other theatrical productions in MacArthur Park?

A. The threats continued, again I continued to let the park know on the annual event, which is always in February when we perform the historic play, and again there were threats of arrests.

I believe in the case of 2001 we did go to the beach and—let me just make sure of what I am saying here. No, I'm sorry, 2001 was a cancelled performance because I have a list of people and, that came from out of town, and their expenses and not having been able to see the play.

Q. Okay.

A. And that was cancelled as a result of the threats to arrest.

Q. I'd like to--

MS. MALVERN: As a result of what?

THE WITNESS: The threats to arrest.

MR. MARSHALL: Okay. Again I'm going to hand Ms. Wyner a document I'm labeling Exhibit 6 that purports to be a letter dated January 23rd, 2001. to T.A. Wyner from Assistant General Counsel Mera P. Levy.

MS. MALVERN: Judge, we're going to object again. Counsel hasn't shown us any of these exhibits in [30] advance of the hearing so we could review them or anything

of the like. We are simply having them read to us over the telephone. And I understand that he might be reading them accurately, but they could be taken out of context with other letters that we don't have available to us at this moment at this hearing.

THE COURT: Okay. Well, I understand. For purposes of this hearing I'm going to overrule the objection because of the time constraints of a preliminary injunction or temporary restraining order. I will assure you when he finishes whether he's read it accurately so that at least you will know it says what it says it does. I also note it is a Department of Environmental Protection letter.

Go ahead.

MR. MARSHALL: Okay.

As I said, this is addressed to T.A. Wyner.

It says, "Dear Ms. Wyner: Ms. Brantley has asked me to respond to your letter dated January 2nd, 2001, in which you have informed the department of your intent to perform the play "MacArthur, The Man, The Beach And The Skinny-Dippers" at John D. MacArthur Beach State Park on February 18th, 2001. You stated that the play includes several scenes in which the actors will be nude. You then asked whether the department believes it has any [31] basis for restricting your plan.

"As has always been the case, the department, specifically the Division of Recreation and Parks, welcomes free speech activities in all state parks. However, the division has several significant government interests to protect which require the imposition of certain narrowly tailored time, place and manner restrictions.

"One of these restrictions is that all free speech activities be conducted in compliance with Rule 62(d)2.14, Subsection 7(b), FAC, which states that, quote, in every area of a park,

including bathing areas, no individual shall expose the human, male or female, genitals, pubic area, the entire buttocks or female breasts below the top of the nipple with less than a fully opaque covering, end quote.

"The division hopes you and your fellow participants will respect and comply with this and all other applicable park rules. Please coordinate your free speech activity with the park manager as provided for in Rule 62(d) 2.014, Subsection 18, and please refrain from appearing nude in violation of Rule 62(d)2.014, Subsection 7(b).

"Pursuant to Section 258.007, Subsection 2, Florida Statutes, the violation of any park rule is a [32] misdemeanor which can result in an arrest. Thank you for your cooperation. If you have any further questions or concerns please feel free to contact me at the above address or phone number."

BY MR. MARSHALL:

Q. Now, Ms. Wyner, did the—was this the same play that you proposed in 2001 that had actually been performed in prior years?

A. Yes.

Q. Did the play get performed in 2001?

A. No. And I believe there's a follow-up letter from the same attorney from DEP. When they threatened to arrest the cast of my play I decided that I would try and revert to the old demonstration, which was the costume of the Bill of Rights.

I then let DEP know that I was going to retreat from the performance of the play, spare my cast being arrested, and go back to the costume of 1990, which was the Bill of Rights, and I believe their response letter to that was that it too would be in violation. Having already charged me with—

MS. MALVERN: Objection, hearsay.

THE WITNESS: Well, there's a letter that—

BY MR. MARSHALL:

Q. But is that your recollection of the position of [33] the department as given to you?

A. Yes.

Q. Okay. Was there any performance in 2001?

A. I believe not.

Q. Okay. Did—

THE COURT: Why would a letter from DEP be hearsay?

MS. MALVERN: Well, that's a good question I guess. I thought she didn't have the letter. I should have said best evidence.

THE COURT: Okay.

THE WITNESS: There is a second letter.

MR. MARSHALL: For the sake of—I didn't think that this letter was necessary, but it's come up, I would go ahead and put it in, call it Exhibit 7.

MS. MALVERN: So we do have the letter?

MR. MARSHALL: I do have the letter. However, I will disclose that there is handwriting on it that I believe is Ms. Wyner's. I would simply at this point ask the Court to ignore the writing because it's not part of the letter and is not from the department.

MS. GUARD: Judge, we would just state our objection, understanding your ruling.

THE COURT: Okay, the objection is overruled.

The letter says, "Dear Ms. Wyner: In your [34] letter dated February Seventh, 2001, you describe a costume you intend to wear on February 18th, 2001 at MacArthur Beach State Park and ask whether the department believes this costume would be in violation of Rule 62(d)-2.104(7)(b), Florida

Administrative Code, or would be cause for a disorderly conduct charge.

"Without having seen the exact costume you will wear, the department is not prepared to offer an opinion as to whether it conforms with Rule 62(d)-2.104(7)(b) or whether it would be grounds for a charge of disorderly conduct.

"Sincerely, Mera P. Levy, assistant general counsel."

MS. MALVERN: It mischaracterizes the testimony then.

BY MR. MARSHALL:

Q. Well, is this the letter you received from the department?

A. Yes. Actually, I think there might be another letter.

Q. Okay.

A. But okay.

Q. Counsel has not seen another letter. But the question I would ask, Ms. Wyner, is, given whatever exchange you had with the department in 2001, what was [35] your decision about going forward with the performance in MacArthur Beach State Park?

A. Actually, the clock ran out. If you check the date on this, again I typically let DEP know the day after New Year's Day, these letters go back and forth, phone calls in between, etcetera, and the clock merely ran out.

Q. Why do you notify the department in advance?

A. In an attempt to avoid arrest.

Q. Why is that? Why do you want to avoid arrest for—

A. Because I am somewhat responsible for giving information to people who will be on the beach. As I said, an audience member has already been arrested. So I have to let these people know. And what this has done continually is diminish the audience and their own First Amendment rights in not an unfettered marketplace.

Q. How about 2002, was there any performance?

A. No, there was no performance in 2002.

Q. Was there an attempt to perform?

A. No. At that time I think we knew that any remedy would have to come from court.

Q. Let's go to this year now. Could you tell the Court your steps that you took in terms of—well, first explain what it is that you intend to do tomorrow [36] if permitted.

A. Tomorrow my intention is to direct individuals in a political image of, an anti-war image, by creating a peace sign, the symbol of peace, created by nude bodies.

Q. Could you explain to the Court what this protest is that is intended tomorrow?

A. It's directed at the potential war in Iraq.

MS. MALVERN: I'm sorry, a little louder,

THE WITNESS: It's intended to be a protest against the potential war in Iraq.

BY MR. MARSHALL:

Q. What steps did you take in 2003 to work with the department in terms of the planned demonstration?

A. Once again, I phoned the park soon after the first of the year, as I, and learned that there was a new park manager who just happened to be on vacation. The first call I made actually was to the nature center to find out if there were any weddings, large organizations, tours or whatever scheduled for the day that we intended the peace image.

Q. Were there?

A. No.

Q. What else did you do?

A. Then I phoned the park manager who ultimately did return my call and we spoke by phone, Mr. Coullitte, who [37] I had not met yet, and he and I spoke and I let him know what my intentions were, and I asked him what he was going to do and he said that he would speak to his supervisors. He then called to let me know that a letter had come from

Tallahassee, oh, that he, the supervisors requested that he ask me to put my plans in writing, which I did.

Q. Okay. How did you put those plans in writing?

A. By e-mail I believe.

Q. And would that be Exhibit 2 attached to the verified complaint?

A. Yes.

MR. MARSHALL: Your Honor, I might ask, having moved for admission of these other exhibits, is it sufficient that these were attached to the verified complaint or should I make a formal motion to admit them into evidence?

THE COURT: Why don't you go ahead and make the motion so we can find out—

MR. MARSHALL: Okay. I would move to admit Plaintiff's Exhibit 2 attached to the verified complaint.

THE COURT: Which is the e-mail?

MR. MARSHALL: Which is the e-mail from T.A. Wyner to Terence Coullitte.

[38] THE COURT: Any objection to that?

MS. MALVERN: No objection.

THE COURT: All right, Exhibit 2 to the complaint is admitted.

MR. MARSHALL: I would also back up and move to admit Exhibit 1, the stipulation for settlement in Simon versus DeWald entered into by plaintiffs and defendants.

MS. GUARD: Judge, we object to the extent that it bears handwritten markings. If the plaintiff has a clean copy or if it's amenable to essentially ignoring those or, the handwritten marks on there, we don't have any objection.

MR. MARSHALL: Sure. I apologize to the Court for not getting rid of those handwritten marks, but they are irrelevant to the document itself.

THE COURT: All right. The stipulation is admitted minus the handwritten remarks.

MR. MARSHALL: Okay.

BY MR. MARSHALL:

Q. Now, Exhibit 2 then, the e-mail, explained to the department what it was you intended to do?

A. Correct.

Q. Did you receive a response from Mr. Coullitte?

A. Yes, I did.

[39] Q. Okay. And let me show you Exhibit 3 to the verified complaint and ask you if this is the response you received from Mr. Coullitte?

A. Yes.

MR. MARSHALL: I move for the admission of Exhibit 3, Your Honor.

MS. MALVERN: No objection.

THE COURT: All right, 3 is admitted.

BY MR. MARSHALL:

Q. When did you next hear from Mr. Coullitte?

A. Are you talking about after his e-mail?

Q. Yes. Well, the e-mail itself didn't resolve the question, did it, in your mind?

A. I think that was the only e-mail exchanged. I think there was just one e-mail from me at his request that I put it in writing and then an e-mail from him which I had also asked him to copy to my attorney, Jim Green, at that time, and I think that was the extent of our correspondence.

Q. Okay. Let me just ask you to take a brief moment to read the Exhibit Number 3, the response from Mr. Coullitte, and then I will have a question for you.

A. You want me to read this out loud?

Q. No, to yourself, please.

A. Okay, from Mr. Coullitte, okay, yeah, this was the [40] first response from my original letter.

Q. What was your impression then of your ability to put on the display and protest that you sent to him at that time?

A. To go ahead and let people know to come on, it's happening.

Q. Did you hear anything further from Mr. Coullitte?

A. Yes.

Q. And when did you next hear from him?

A. I don't have the date, but again by e-mail, this time referencing the, for lack of a better term, bathing suit code being charged if there was any nudity involved in the demonstration.

Q. Let me show you Plaintiff's Exhibit 4 attached to the verified complaint and ask you to take a moment to look at that document.

A. Okay.

Q. Now, is your testimony that there was another e-mail prior to this document?

A. Yes, the one that says, "Thank you, I think everything is working out," whatever.

Q. Okay. Which was Exhibit 3?

A. Correct.

Q. But was there any other e-mails between Exhibit 3 and Exhibit 4?

[41] A. I think there might have been just an e-mail of thank you between he and I, he thanked me, I thanked him, whatever.

Q. Okay. So your testimony about referencing the bathing suit code was actually to Exhibit 4; is that correct?

A. Correct.

MR. MARSHALL: I will move for admission of Plaintiff's Exhibit 4, Your Honor.

MS. MALVERN: No objection.

THE COURT: Exhibit 4 is admitted.

BY MR. MARSHALL:

Q. Ms. Wyner, what is your understanding, given Exhibit 4, as to your ability to put on the planned protest and display tomorrow?

A. That this is total disregard for the expressive nature of nudity and that their bathing suit code will be used against any demonstrators, despite their intent for expression, and they would be charged with it.

Q. Could you explain to the Court how nudity fits into the expression of anti-war sentiments through the formation of a peace symbol?

A. If I could just back up—

Q. Certainly.

A. —again, one of my first political appearances was [42] the anti-war movement of the Vietnam era, and an the day that Kent happened and people were killed in the anti-war move-ment at Kent University there was a large conference of people organizing the moratorium in 1970 and my suggestion at the time, because when Kent happened the, supposedly before people were shot, the National Guard thought they heard shots fired by students or thought that students had firecrackers or whatever, so it was my suggestion for the moratorium nation-wide that the moratorium be nude, and the reason for that would have been, my argument was that clearly no one would be armed and that the nudity in itself was an image of vulnerability and that perhaps it would not, it would be a safer way to do the moratorium. That didn't happen.

Years later now we get to this era, the Iraq war, and I am not the originator of the idea, all over the world people have been using this, people who are not naturalists have been using nudity to form peace signs from Australia, Marin County, California, British Columbia, Gainseville, it's been happening all over the world, and we are merely taking the

lead from what has become the image of the anti-war protest era.

Q. What does the image of nude bodies convey that the absence of nude bodies would not convey?

[43] A. I believe it is the vulnerability and the absence of weapons or arms.

MR. MARSHALL: With that, Your Honor, I have no further questions of Ms. Wyner.

THE COURT: Let me ask, I thought that the article I saw talked about some coordination with another event possibly, and also is there some timing issue with respect to February 14th and other events, other protests of the sort?

THE WITNESS: Yes. Let me answer your first question first. There is an anti-war—there are anti-war rallies the following day in West Palm Beach and beyond.

THE COURT: By the following day, you mean the 15th?

THE WITNESS: Correct.

On the day itself, the idea of peace and love on Valentine's Day is a part of it. The period of February is always the, that traditional time. The reason that you see ill of these plays and other demonstrations happening in February of each year is that it is also the period we naturalists convene from all over the country in West Palm Beach for educational seminars, entertainment, athletic activities, etcetera.

THE COURT: And how many people do you expect?

[44] THE WITNESS: On the beach?

THE COURT: To participate in this performance, if you do it.

THE WITNESS: Well, I have to say that, considering the fact that DEP has spoken and the threats of arrest are out there, it could be very minimal again because audience mem-

bers, there has been an audience member arrested in one of my performances, and that has a chilling effect even on someone who would formerly just come to be an observer. So it's always very difficult for me to say how many people would be there.

I'm shocked and surprised when five hundred people show up and disappointed when hundreds of people are chilled to come, and so I really can't say.

THE COURT: Your complaint says something, maybe it was what you said in the paper, if that was you, "If there are a few people, we'll do it with a few, if there are more, we'll do it with more." I don't know how one person can do a peace symbol. Maybe you can, I don't know, but do you have some—I mean your play had a number of participants, I assume you had kind of a, at least a starting point of how many you would have, maybe you could add to it, what is the situation here?

THE WITNESS: I believe the math of it is that it might take seven, minimal seven, to actually complete [45] a peace sign.

MR. MARSHALL: If I might interject, Your Honor, did you notify the department as to your estimate of the number of people?

THE WITNESS: I, in my original e-mail I possibly did, but I probably gave some explanation as well as to I really cannot ever know how many people are going to—I have to say also that, because we have moved from the play to the anti-war demonstration, we have of course crossed over from merely naturalists to the anti-war movement.

And I do know that people involved, even some aides to legislators have told me they will be there. Whether or not they are actually going to be participants in creating the sign, the peace sign itself, I don't know.

MR. MARSHALL: Would it surprise you to have more than fifty people participating in the peace symbol, as you gave the department?

THE WITNESS: Again, because the word is out that this is going on, that I am in court trying to be able to go to the beach and actually have this happen, that is chilling to some people to even show up at that park on that day.

MR. MARSHALL: I apologize, Your Honor, I want [46] to ask very quickly about, who is George Simon?

THE WITNESS: George Simon is the, was the plaintiff for whom the stipulation was written, and is now involved again, because his intent was to be a part of this.

MR. MARSHALL: And is it your understanding that he is on his way or will be on his way from Hawaii?

THE WITNESS: From Maui, correct.

MR. MARSHALL: Your Honor, we did file and fax to the defendants a faxed affidavit from Mr. George Simon. I would offer it as Exhibit Numbr 8 and would substitute the original when he arrives.

MS. MALVERN: Judge, I object not only on relevance but also again it's not notarized or sworn to.

MR. MARSHALL: It is sworn to under—

MS. MALVERN: It has not been notarized, so we don't even know that he signed it.

MR. MARSHALL: If I am correct, 28 USC, 17, I want to say 38, I may be wrong about that, but he has declared under penalty of perjury—

MS. MALVERN: You are correct I will withdraw that objection.

MR. MASHALL: Okay.

THE COURT: I don't think I ever got that [47] one. At least I haven't seen it. It has just been handed to me. Maybe it came in later.

MR. MARSHALL: Yes. That was filed this morning.

MS. MALVERN: We are going to maintain the relevance objection, though, Judge.

THE COURT: Okay. Let me took [sic] at it.

MR. MARSHALL: And then I would explain the purpose.

THE COURT: Okay. In terms of relevance, I am going to overrule that objection. I am not sure it adds much other than that he was a party to the stipulation. Is there any any other reason why his affidavit adds much to this?

MR. MARSHALL: The only other reason, Your Honor, was your one question to Ms. Wyner about why February 14th, and I think she more than adequately explained the significance of that, but I would say that Mr. Simon is on his way from Hawaii for the performance and to, you know, I am not sure what time his flight is leaving, but if the injunction is not issued, then I am not sure that he would want to come.

THE COURT: Okay. I am not sure that carries any weight.

MR. MARSHALL: Yes, Your Honor.

[48] THE COURT: But I will overrule the relevance objection.

MR. MARSHALL: I have no further questions of Ms. Wyner.

THE COURT: All right. Ms. Malvern, do you have questions for Ms. Wyner?

MS. MALVERN: No, I believe we don't. Does anybody have any questions? Of course, the folks here are not the people that know the facts all that well, but I don't think anybody does.

THE COURT: Okay. I have one question. I don't know if this goes to the lawyers or to Ms. Wyner. The stipulation, and I don't have it, I don't have a copy right now, it didn't seem to have a date as to how long it was going to last or whether it was—it seemed to be really just to that play. I was—it seems unusual in terms of settling the case. Was there some understanding by the parties of how long the stipulation would remain in effect?

THE WITNESS: I understood it as an acknowledgment that they accepted that nudity—

MS. MALVERN: I'm sorry, a little louder.

THE WITNESS: I always understood it to be an acknowledgment of the Florida Supreme Court case which said that nudity combined with another form of [49] expression is protected as speech. And, in fact, since then the DEP general counsel has even acknowledged that in the press.

MR. MARSHALL: It was my understanding, Your Honor, granted that I was not a part of this prior litigation, Jim Green is co-counsel with me on this case, that the expectation was that this acknowledgment and stipulation would, if you will, smooth the way to resolve the kinds of problems that have gone on early on with the arrests.

Clearly, a part of the stipulation was simply for the production in 1996, but the acknowledgment was understood to be an admission, if you will, or an acknowledgment by the department that this was protected activity.

THE COURT: Do you have a copy of it? I didn't read it as being limited to 1996. Perhaps that's a fair reading of it. Let me look at it.

MR. MARSHALL: Okay.

(Pause)

THE COURT: Okay, thank you.

Okay, if there are no questions for Ms. Wyner, we will proceed then to some argument.

MS. MALVERN: May I put on a little testimony about that stipulation?

[50] THE COURT: Okay. You want to do that now then?

MS. MALVERN: Might as well, yes.

THE COURT: All right.

PETER SCALCO, DEFENSE WITNESS, SWORN
DIRECT EXAMINATION

BY MS. MALVERN:

Q. Please state your occupation and your name.

A. My name is Peter Scalco. I am chief of operations for the Florida Park Service.

Q. Mr. Scalco, do you have any knowledge about the stipulation for settlement that was done in 1995?

A. The '95 one I really don't. I started being involved with these plays in 1997 as the assistant bureau chief in the district in which MacArthur Beach State Park is located, and we have taken this one exhibit at a time, exhibition at a time, because of the changing rules and regulations, as well as the administrative code changed, and it's our understanding at the park level that we would approach each play as an individual event.

Q. So you don't have any particular knowledge as to whether the park service understood the stipulation applied to that play?

A. No, ma'am.

[51] MS. MALVERN: Never mind then. Okay.

MR. MARSHALL: I do have cross-examination, Your Honor.

MS. MALVERN: Okay.

CROSS-EXAMINATION

BY MR. MARSHALL:

Q. Mr. Scalco?

A, Right.

Q. If I understand you correctly, what you are saying is that the department now looks at each incident or thing to be produced in the park on a case-by-case basis; is that correct?

A. No. What we do is we look to guidance from our legal counsel on each case just to make sure that we are doing the right thing. We are not attorneys so, you know, we ask, if this particular event is taking place, do the rules that applied the last time still, are they still germane to the issue.

Q. Okay. So I understand it, you look at each of these individually, correct?

A. Yes.

Q. Okay. So that even though, for example, the same play would be produced say in 1997 as was produced in 1996, you would still make an independent look at whether it was acceptable under departmental [52] regulations?

A. Well, our question is more to the regulation as to the content of the play. If it's okay, the, we don't make the rules as we go along. If it's legal and allowable under the rules, then we are okay with it.

Q. Well, I understand. But wasn't nudity banned in 1995?

A. I don't know.

Q. Well, under the park's regulations, has the park's bathing and swimming regulations changed in the last few years?

A. Not that I am aware of.

Q. Okay. And so the same bathing and swimming regulation in effect today was actually in effect in 1995, was it not?

A. I have no reason to disagree with that.

Q. And so when the play went on in 1995 and included nudity a determination was made that it did not violate the park regulations, correct?

A. I'm not sure what determination was made.

Q. Well, the stipulation appears to permit a play to go on that involves nudity, correct?

MS. MALVERN: Objection as being asked about the legal effect of the stipulation. He's not a lawyer.

THE COURT: Well, I will overrule the [53] objection to the degree he has an opinion as a chief of operations for the park.

THE WITNESS: Right. Again, I will reiterate that, to my knowledge, you know, what we do is ask our legal counsel as to what rule is applied at any given time, and my understanding is that in '95, and I'm taking this from reading the stipulation and as my experience as a park official, that at that given time in '95, for some reason that I am not aware of, it was okay.

BY MR. MARSHALL:

Q. And so—but your testimony would be that if the same play were to be produced in MacArthur Park in any subsequent year it would still be up to park officials to scrutinize the play to determine whether or not it violated departmental regulations, correct?

A. No, we would ask the legal counsel if that were the case.

Q. Okay. But a determination is made, whoever makes it, on a case-by-case basis, right?

A. Are you speaking to the contents of the play or the legal controls?

Q. Well, certainly in order to get an opinion from your legal department would you not have to disclose to them that the play was to include periods of nudity?

[54] A. Could you repeat that question?

Q. Well, in order to make a determination whether a proposed play would be allowable by the park, you would have to determine what was contained in that play, would you not?

A. Yeah, that makes sense.

Q. Okay. And so you look at what the play is about and what's contained in it to get an opinion from your legal department whether it should be permitted under your regulations?

MR. COLLIER: Objection, mischaracterizes the testimony of the witness. He didn't say he would look at what the play was about.

MR. MARSHALL: Well, that's the question I asked the witness.

THE WITNESS: Well, to put it in simple terms, if we are given notice that a certain event is going to take place and in our opinion and judgment it could be or not be controversial or in conflict with our governing rules, we would ask our legal counsel for their opinion.

BY MR. MARSHALL:

Q. So if you think there may be some controversy you would ask for an opinion?

A. You're asking me?

[55] Q. Yes, sir.

A. Yes, I would personally.

Q. Are there any written standards that the department uses to determine when they are going to seek advice from counsel or just make the determination themselves?

A. Well, if there's—if nothing brings to mind that there might be something you have to ask someone, we don't, but our rules are constant. We just refer to them if something appears to be out of, you know, out of sync with our rules.

Q. Okay. Well, you are aware as chief of operations that there have been additional plays beyond 1996 in MacArthur Park that included periods of nudity, are you not?

A. Yes, I am. I have witnessed since '97 every one of them.

Q. Okay, you personally witnessed them?

A. Yes, sir.

Q. And those were not prohibited by park rules; is that correct?

A. Certain limitations as to time, place and manner were placed upon them, then we had a ruling that, following a legal action about the screening, and then at some other times the parties, for reasons that were not shared, decided not to be nude. So each one has [56] been a little bit different.

Q. But in each of those instances where nudity occurred it is correct to say that the department did not apply its bathing and swimming regulation, correct?

A. No. We did apply it.

Q. Well, oh, are you saying that the nudity did not violate the bathing and swimming regulation?

A. No. I'm saying that the context of the play fell within the parameters of our understanding of the legality of the action.

Q. And what was your understanding?

A. It was different every year.

Q. How did you make that determination when nudity was okay and when nudity was not okay?

A. Well, we, again I go back, we asked our legal counsel as to what rules were in place and we were told that if they go behind the screen and they lived up to the agreement then it's okay. If they don't go behind the screen and they don't live up to the agreement then it's not okay.

Q. Well, was that considered for this year, 2003?

A. I can't speak to that. That was between the legal counsel and the park manager. I wasn't part of that decision process other than to help facilitate the communication between the district and the operations [57] office.

Q. But at least in prior years when you were involved in presenting this question to the legal department you had to be in a position to describe what was going to be presented, correct?

A. I forwarded the description provided to me by Ms. Wyner and asked for counsel.

Q. And then the decision would be made upon the description provided to you by Ms. Wyner?

A. Correct, as long as that was in keeping, as long as the action was in keeping with the description provided.

Q. And so it is your testimony that some nudity is permitted within MacArthur Beach State Park, notwithstanding the bathing and swimming regulation, that is attempted to be applied tomorrow?

A. The nudity is not allowed ever except in the particular context of when the legal counsel says certain parameters have been agreed to.

Q. And that is made on a case-by-case basis?

A. No. The rule is consistent, it's whatever, you know, whatever rule—for instance, when 16(d) got changed to 62(d) we find out is this okay and we're told, yes, and as to time, manner and place you can do this.

Q. Okay. But—

[58] MS. GUARD: Your Honor, this is way, way beyond direct examination, and he's asking for legal opinions from the witness. He's already been told that legal counsel was the person who provided the opinions and not the witness and the witness is constantly being asked again for his opinion on how those decisions were made and he has been told that he referred them to counsel based on Ms. Wyner's description.

THE COURT: Well, I am going to overrule the objection. He said initially it was done on a case-by-case basis and so I think the cross-examination is appropriate. I didn't understand that it was just up to the lawyers. Is that the position you take?

THE WITNESS: Are you asking me, Your Honor?

THE COURT: Well, I was asking the lawyer who made the objection. It seemed like she said that was the position, that it's really just the decision made by the lawyers.

MS. GUARD: He said that he referred Ms. Wyner's descriptions to legal staff. That is what the witness has testified to. And if you want to ask the witness to clarify that for Your Honor, please ask.

THE WITNESS: Yes. To simplify, we get a description of the event, we get a letter that says we're planning on holding an event, it gives a date, [59] usually gives us a ballpark figure of people and the time, we make our legal counsel aware that the play is being scheduled and ask for guidance. That's what we do. And we do that every time.

BY MR. MARSHALL:

Q. And so you forward what is going to be presented to make a decision, that's your testimony?

A. Yes, sir.

Q. Okay. Well, isn't it correct that the regulations under which the park operates vest the time, place and manner restrictions in the park manager?

A. With, you know, with advice from legal counsel and division management.

Q. And so your testimony would be that in any case involving nudity it would have to be discussed with legal counsel?

A. Yes.

Q. And that could not be made by the park manager?

A. No.

MR. MARSHALL: No further questions, Your Honor.

MS. GUARD: I have just a few questions on redirect, Your Honor.

THE COURT: Okay.

[60] REDIRECT EXAMINATION

BY MS. GUARD:

Q. One, the first one, isn't it correct or wouldn't it be fair to state that in the past years we're talking about this specific

play that is discussed in this stipulated stipulation far settlement, the play that was described, you were here in the room, and it was described by Ms. Wyner?

A. Yes.

Q. Isn't that fair to say that's been going on in the past?

A. Yes, ma'am.

Q. And is it your understanding that this year something other than the play is going to go on?

A. Yes, ma'am.

MS. GUARD: Nothing further.

THE COURT: Well, what's different about it then?

THE WITNESS: We understand it's, well, we had to ask the questions about the screening, we had to ask the questions just about the context of the play.

THE COURT: What does that mean? They both had nudity, and you say this one is different, what's different about it?

THE WITNESS: Well, sometimes they had nudity, [61] sometimes they didn't, sometimes they were told they had to go behind the screen, sometimes it was five people, sometimes it was fifty people.

THE COURT: Any other issues? Numbers of people, whether the screen is there, anything else?

THE WITNESS: Well, the previous plays, you know, talked about John D. MacArthur and the history of the park and this one seems to be about a peace demonstration.

THE COURT: Why is that significant?

THE WITNESS: Well, just that, from an operations standpoint, I mean the play is not significant, but the number of people could be different, so we have to just take that into consideration.

THE COURT: Okay. Any follow-up on the questions I asked from any of the lawyers?

MS. GUARD: No, Your Honor.

MR. MARSHALL: No, Your Honor.

THE COURT: Okay. Thank you, sir. Any other witnesses?

MR. MARSHALL: Not for plaintiff, Your Honor.

THE COURT: Ms. Malvern, anybody else?

MS. MALVERN: No, we don't have anybody else.

THE COURT: Okay. Why don't we take some [62] argument then on this issue.

MR. MARSHALL: Your Honor, I would submit that—

THE COURT: Do you all mind if we take a—I need to take about a five minute break. Is that all right with y'all?

MR. MARSHALL: Absolutely, Your Honor.

THE COURT: I'll leave the phone open, but I am going to step out for about five minutes. I'll be right back.

(Recess taken)

THE COURT: Okay, I'm back, and Ms. Malvern, are y'all there?

MS. MALVERN: Yes.

THE COURT: Okay, great.

MR. MARSHALL: Thank you, Your Honor.

Your Honor, I think that the chief of operations testimony has made quite clear that what is going on with this case in 2003 with T.A. Wyner is the epitome of content based decision making. He testified that the department looks at this on a case-by-case basis. They look at the context of what is being presented. He could not describe there being a difference between a play and a demonstration.

All we need do is compare plaintiff's [63] theatrical productions that have occurred several times in the park that contained innocent nonerotic nudity that were permitted and witnessed by park officials to now plaintiff's protest display of a peace symbol that will contain innocent nonerotic nudity and the department says, no, that is banned.

On what basis could they make that decision? They could only make it based upon the description of the larger message that was to be conveyed. And now it is government that wants to say what is acceptable in terms of the message that is to be conveyed by T.A. Wyner and others and the message that is to be heard by plaintiff Simon and others.

THE COURT: Well, you put a lot of weight on a couple of answers. Actually this play, it looks like it has been done twice with nudity and no arrest, one of those times with a screen and the plaintiff was unhappy with the screen, a third time there were posters and a screen but then it sounds like everybody was clothed, so the department, it sounds like, has been somewhat consistent in fighting it.

Then they entered into this stipulation, which I guess was an effort to settle the lawsuit, permitted it twice, and then it has not been permitted it looks like. Is that basically—in terms of the history, it [64] certainly is not equivocal to allowing of the play either, is it?

MR. MARSHALL: It is a grudging allowing of the play, that certainly is correct, but a grudingly allowing that was hard fought in the legal arena and ultimately settled to the satisfaction of plaintiffs. And now it is the department reneging upon the concession that was made in 1995 and what the courts have told us is expressive activity worthy of protection by the First Amendment.

This is not a mere display of nudity for gratuity effect. It has a message that is intertwined with what they're trying to say. Whether the department agrees with it or whether I agree

with it or not, it is a part of the message that is chosen by the speakers to be heard by the listeners.

THE COURT: Okay. Well, just for, let's lay aside for a moment the fact they have allowed it to a degree.

MR. MARSHALL: Okay.

THE COURT: And. assume that she's approaching them for the first time and they have this, apparently they have a ban on nudity, and then they have this First Amendment rule which doesn't speak one way or the other to nudity. What's your argument then?

[65] MR. MARSHALL: The argument is, Your Honor, that it is I think incorrect to say that there is a total ban on nudity in MacArthur Park because the provision that they are relying on, 7(b), makes clear that what they are banning is nudity in bathing and swimming, and that is consistent with the cases that have held that there's no protection of mere nudity in the park.

THE COURT: So if somebody wants to put on "Hair" at the park, what's the, how does the rule, how is the rule applied?

MR. MARSHALL: I think that the way this has to be read consistent with the First Amendment is that, although we quibble with the unfettered discretion in terms of time, place, manner restrictions, I would say this, that first if the decision is, in fact, content based, which we aver that it is, then strict scrutiny applies and this has to fall.

But let's set aside the content base for a second and talk about just "Hair" coming to the beach. I think that "Hair" falls within 18, that the department can put on reasonable time, place, manner restrictions, but they can't apply 7(b) as a manner restriction, because of the rule, if you will, of allowing First Amendment protected activity.

[66] Now, the department could as a reasonable manner restriction say we are going to post signs saying that this production is going on in the park and it involves nudity, and this is where it is, it's fifty yards ahead, if nudity offends you, don't go there. That is reasonable.

What they are trying to do is look in, and on a case-by-case basis they would have to look at "Hair" and see what is being conveyed as a message within "Hair" so they can determine on a case-by-case basis whether to allow nudity as a part of "Hair" or to reject it.

Because in the past they have made a determination that it can be allowed in MacArthur, the man play, they would have to make that same determination based on what's in "Hair".

THE COURT: Okay. So if they just say, well, you can do "Hair", we have no problem with "Hair", you just have to wear clothes, what's the problem with that?

MR. MARSHALL: Well, I think the problem with that is that "Hair", the nudity in "Hair" was inextricably intertwined with the purpose and the message of the play, and I think it was widely recognized during the time of its production that, in [67] fact, it was part of the performance, it was part of the message, it wasn't, it wasn't just merely people were putting on a play and then they took a break and everybody took their clothes off to stand nude in a park.

It was inextricably intertwined as part of the artistic expressive nature of the play to include the nudity, just as Ms. Wyner testified, the nudity, clearly innocent nonerotic nudity by people laying on the ground in the form of a peace sign, is not a frolic in the park, it's a part of a message that conveys more because of the lack of clothing.

THE COURT: Well, has that Thomas versus Chicago Park District case changed the analysis? It seems like they basically, some of the old arguments on the discretion that a park

manager can have may have gone by the wayside after that case, it would seem like.

As long as they apply it neutrally, you couldn't, under that you couldn't accept some nudity and not others or you couldn't have "Hair" and not Ms. Wyner's play, but it looks like you might be able to read that to say, well, the Chicago park, they may just decide the park is for people who want to go on picnics, if people want to go to a play they can go somewhere [68] else, and just prohibit nudity, or at least if they want to go a nude play, they can go somewhere else.

MR. MARSHALL: Well, I don't think that, and I will say I don't have Thomas at my fingertips right now, but it does strike me that the appropriate analysis is, one of the first, is what's the forum, and this is, as pronounced by the Eleventh Circuit, a traditional public forum in which, in order to restrict the speech, there needs to be compelling governmental interests with the means narrowly tailored to achieve that interest.

However, they can't apply content neutral time, place and manner restrictions. So, for example, they could have said to Ms. Wyner, I'm sorry, we have a large group of children coming at 11:30, can you do it at 9:00? I think that might be a reasonable time restriction.

It is a reasonable place restriction to say, You can't form this peace symbol at the entrance to the park where everyone is going to be coming through, please move it to the other areas where you have always had periods of nudity, and that would be a reasonable place restriction.

THE COURT: Are you challenging the rule facially or just as applied to these circumstances?

MR. MARSHALL: In this case we are challenging [69] both facially and applied to when it, in terms of allowing 7(b) to be a part of 18. In other words, the problem with 18 is,

certainly as applied in this case, is the unfettered discretion of the decision-maker, who the rule says is the park manager, to determine, without any kind of standards, without any kind of guidelines, a manner restriction that, in effect, is a total ban.

It eats up the whole role of the time, place, manner doctrine to completely ban nudity as a part of this display. And we do think that without articulable standards in place that on its face 18 does run afoul of constitutional mandates, but certainly as applied.

THE COURT: Okay, thank you.

Ms. Malvern, what is the department's position?

MS. MALVERN: well, our position is, as you say, the Rule 7(b) just bans nudity in every case. In that case it is content neutral. The differences that have occurred over the years has simply been different lawyers interpreting different Supreme Court opinions, not anything to do with the content but had only to do with trying to figure out what, where, if it's nudity, free expression, when is it free expression.

And I think our latest opinion is that, if it's a content neutral regulation like this one, in [70] every area of the park, including bathing areas, no individual shall expose the human male or female genitals, pubic area, the entire buttocks or female breasts below the top of the nipple with less than a fully opaque covering, and it's quite content neutral, quite specific, quite clear.

And I think they said they could perform in thongs if they want to, but it's—

THE COURT REPORTR: Perform in what?

THE COURT: Thongs.

MS. MALVERN: Yes.

THE COURT: The court reporter didn't catch your word.

MS. MALVERN; Thongs, you know, that kind of bathing suit, minimal bathing suits. It has been a while. But some kind of covering of the genital area is the park rule. And they have been informed by their lawyers that they can enforce that rule. And ever since 2001 they have intended to do so.

THE COURT: So "Hair", you wouldn't allow "Hair"?

MS. MALVERN: I don't believe they would in a public park. If it were in an auditorium, of course, that's different.

THE COURT: How about "Equiese"?

[71] MS. MALVERN: Same thing.

THE COURT: And the Nicole Kidman play, that wouldn't be permitted?

MS. MALVERN: Nothing that involves nudity would be permitted in the public park is my understanding unless it is in a theater where people could choose whether or not they wanted to go to it.

THE COURT: Well, in effect, you set that up when you used the screen, though, didn't you?

MS. MALVERN: That I guess was someone's understanding at some time. But I think the understanding now is that the whole park should be available to all people and not set aside for some people.

THE COURT: I don't want to put too much weight on a fellow who got put on the spot kind of at the last minute, but it sounds like it's essentially the lawyers deciding these cases rather than some discretion vested in the park manager.

The First Amendment or the First Amendment activities section talks about discretion in the park manager, but I certainly didn't hear very many criteria that the park manager uses other than to ask the lawyers what we think we can, what we can do. Isn't that—

MS. MALVERN: I think that's because, as I [72] say, the law has been changing so much that when it's the issue of nudity they just haven't been sure what they are allowed to do. The rule says no, but some early cases seem to indicate that, if it had an expressive aspect, it had to be allowed. More recent cases seem to have allowed there to be some content neutral regulations.

THE COURT: Well, there's none yet on "Hair" or anything like that. There's a couple on topless bars and whether they have to wear patsies or not. But I haven't seen any—hasn't the Supreme Court essentially said things like "Hair" are protected speech? You think that—what's your best case for saying you could keep that out of Grand Central Park or New York's park or the Chicago park or MacArthur Park?

MS. MALVERN: Well, I'm not sure on that one, Your Honor. I think you wouldn't keep it out entirely, but in that case you probably would try to find some area that, where people could choose whether or not they wanted to attend it.

THE COURT: Y'all didn't want to try to do that here? It would seem that was—your stipulating was an effort to do that with her other play. I guess if I were to compare the type, the importance of speech, and that's always a dangerous territory to get into, you [73] have to say that perhaps a war protest is more significant at least to more people than the "MacArthur, The Play, The Man, And Skinny-dippers."

MS. MALVERN: Yes, Your Honor, I wouldn't disagree with that.

THE COURT: Yet it seems like the only difference he was able to cite for the difference between this and that was this is an anti-war protest.

MS. MALVERN: I believe he said he expected more people to attend.

THE COURT: Well, I guess that is a—but you don't really have standards on people, numbers of people that the park could hold, do you?

MS. MALVERN: There's a carrying capacity I believe.

THE COURT: Why wouldn't the curtain or screen solve the problem of somebody would doesn't want to see it, see nudity? Seems like that would solve that problem, wouldn't it? Even under an O'Bryan test wouldn't you need to consider something like that?

MS. MALVERN: I'm conferring with the client here.

(Pause)

MS. MALVERN: That's an option. I don't think necessarily they would be opposed to that, although I [74] don't think under the law that they have to do that. There's the law that it doesn't have to be the least restrictive alternative. It seems like they have ample room for expression if they do their same demonstration just wearing some kind of minimal bathing suit.

The law that says under Ward versus Rock Against Racism that the rule must be narrowly tailored does not mean you must use the least restrictive means. And in that case we cited to you, Federal District case, the Kraft case, it actually applied it, it was very similar to this situation, and it said that it did not violate First Amendment rights to, and this was a demonstration, it was a demonstration against exploitation of women, and it said it didn't violate the First Amendment rights to say that they, if they wished to do this demonstration, they had to wear some clothes. That is Kraft versus Hodell, 683 Fed.Sup, 289, District Court, District of Massachusetts.

THE COURT: Are you able to, and there was no testimony on this, maybe you are not able to respond, there seemed to be a change in tone between Mr., the park manager's e-mail

to her, which I think would be number, the first e-mail, and the last one, he seemed to say he didn't see a problem and then later on seemed to say, seemed to see more of a problem. Is that—is [75] there anything you can add to just that, the text of those two e-mails?

MS. MALVERN: Well, the first one does say, "I will advise you as to any issues or concerns that have been brought to my attention," so I guess some issues or concerns were brought to his attention.

THE COURT: But then that means the park manager isn't the one deciding, doesn't it?

MS. MALVERN: It's a brand new park manager, so he needed to consult with people.

THE COURT: Okay, because he seemed to say, "I don't see a problem," and then went up the line and there was more of a problem. That at least adds the specter of a content motivated decision that now an anti-war protest is looked at differently than a, than what happened in the past.

MS. MALVERN: Well, as you mentioned, in the beginning of 2001 the play wasn't allowed to be performed either, and that wasn't an anti-war protest.

THE COURT: Okay. Any—

MR. MARSHALL: I would say that it's not correct to say that the play wasn't allowed to be performed. There was a choice on the part of the plaintiff not to do it.

MS. MALVERN: I thought the letter that you [76] read, January 23rd, 2001, from Mera Levy, said, "You can do the play but you have to wear clothes."

THE COURT: Yeah, it looks like they tightened up their approach to it in 2001 and went back to you have to wear clothes.

MR. MARSHALL: Part of the problem here is the state's interest that, at least they articulate to Ms. Wyner, is an interest of keeping the park open, and frankly that seems like a very confusing kind of interest here, because the park is there and the park only holds so many people, and Ms. Wyner goes the extra step of trying to ascertain a time when there aren't going to be other large groups around, and it seems to me, in the absence of some demonstration by the departmental officials that this kind of activity interferes with their ability to keep the park open, I don't see how a flat-out ban is tailored in any way to keeping the park open.

MS. MALVERN: Your Honor, this was exactly what was addressed in the Kraft case, a substantial interest in maintaining the attractiveness of the beach and ensuring that the beach is available to all users, protecting the public from the offense of nudity, that was upheld in Kraft.

MR. MARSHALL: But the real part of Kraft was [77] that it was a couple of women who were on the beach partly nude, there wasn't even an apparent demonstration that they said they were demonstrating on, that was sort of an after-the-fact kind of rationale for why they were doing it, and our own Florida courts have said that nudity for nudity's sake isn't protected, and we are not here to quibble with that.

THE COURT: Well, except then at least they had at least an argument that they were there for a demonstration. I mean, the problem with that is it almost gets, I think the department probably prefers, I don't know whether it's permissible or not, prefers a sharp line test; otherwise; I mean you might get into, you know, some local bar might decide to have topless dancing out at the park as well.

MS. MALVERN: Also, Your Honor, a sharp line test avoids content discrimination.

THE COURT: Well, except you haven't applied that. But, let me ask him a couple of questions first. I'm sorry, but so

what—what you just suggested to me, that the women's demonstration wasn't really a, wasn't really art I guess is almost what you said, doesn't that just invite the courts to try to make these distinctions and say, well, this anti-war protest with nudity is okay but a demonstration by two women in support of women is [78] not, or a topless dancer, because the courts have said that at least operates on the border of First Amendment protection, that that is not okay?

I mean, what test do you suggest that would allow either me or for the department—how does the department go about this?

MR. MARSHALL: I think the Court, the Supreme Court has already answered those questions, and I think the Court—

THE COURT: When?

MR. MARSHALL: I think they answered in looking at symbolic speech, okay, and in Spence v. Washington.

THE COURT: But how about this, these women they are talking about, I thought they were talking about the vulnerability of women and domestic violence, wasn't that what they wanted to protest about? That seems a little like what she's talking about.

MR. MARSHALL: Right. But I think what would have to happen, part of the test is is the public viewing the protest, seeing the symbolic speech for what it is, and if you are a member of the public and you are walking along the beach and there's a woman sunbathing in the nude, they see a woman that's sunbathing in the nude.

[79] Now, if there are a group of women there that have a placard saying, you know, "Women Are Oppressed," and, you know, and there's a clear kind of protest going on that conveys a message and nudity somehow fits into that, then it imbues the First Amendment protection on that.

THE COURT: Why can't they just say, "On state parks we think there may be other places for nudity involved in speech, but just not in state parks, state parks, we're going to hold them, they are public forums but they are limited in that we don't allow nudity, you can do whatever else you want," why is not that a defensible regulation?

MR, MARSHALL: Well, I think the problem is two-fold. Number one, written on the history that we have here, that's not what the department has done. Now, maybe the department intends to do that in the future, but to change the rules of the game when a peace protest comes along really does give the very strong impression that it is the message that is being conveyed that they don't like as opposed to some new-found desire to enforce an across-the-board ban.

And it would seem that, if the department wants to do that, they need to take a close look at their regulations and promulgate regulations that apply [80] outside of bathing and swimming, because the nudity is clearly in the context of the regulation.

THE COURT: Let me see that regulation on that aspect of it.

MR. MARSHALL: Okay.

MS. MALVERN: That's not really controlling.

THE COURT: Well, let me read it again first and I'll give you chance to respond to all of his arguments.

MS. MALVERN: The title up there is not controlling because the nudity is clearly in the context of the regulation. It's true the label says that, but that is not really controlling.

THE COURT: Okay, well, let me read this first.

MR. MARSHALL: I have the entire Chapter 26(d) and I have highlighted both Section 7 and Section 18.

(Pause)

THE COURT: Okay, thank you.

Go ahead, Ms. Malvern.

MS. MALVERN: I was just saying the title up there is not controlling. There are a lot of statutes that are poorly organized and rules that are poorly organized, and it very clearly says "in every area of the park, including bathing areas," not only bathing [81] areas, so it goes beyond the heading above it. I think it's quite clear.

THE COURT: Although you seem to take the position, as I read that, in an administrative, the hearing officer's opinion with respect to that fellow, was it the, the physicist, Manderson, or whatever his name was—

MR. MARSHALL: Fratson (phonetic).

THE COURT: Yeah. You seemed, the department took the position and the hearing officer seemed to say, kind of like the operations man said, that in deciding free speech activities basically you look at it on a case-by-case basis and consider all, you know, all the factors.

It seemed to be almost boundless discretion in terms of free speech activity, that they didn't, at least in that case, they didn't, you didn't seem to apply this bathing and swimming provision to ban any kind of nudity.

MS. MALVERN: Well, it wasn't a nudity—it wasn't nudity at stake, it was just a facial attack. The nudity provision was not an issue in that case.

THE COURT: Isn't that what he wanted to do? I thought that is what he was—wasn't he a naturalist who wanted to go there nude?

[82] MS. MALVERN: He may well have, but he abandoned that aspect of his case, then just tried to do a facial attack on it, rather than an applied attack.

THE COURT: So his complaint was just the amount of discretion?

MS. MALVERN: Right, as the Court decided, upheld the rule, because it wasn't a prior restraint in part.

THE COURT: Don't you have a concern about, I mean you can't just ignore the history, there has been a history where this has been permitted at times, although perhaps grudgingly, don't you worry about making your stand at a time when they are talking about an anti-war demonstration?

MS. MALVERN: Well, we made the stand for the first time in 2001, which had nothing to do with an anti-war demonstration. If it were true, that that were so, yeah, that would bother me a lot. But actually the stand was made over something else other than an anti-war demonstration.

THE COURT: You are talking about her thing before or is there some other—

MS. MALVERN: The letter from Mera Levy in 2001 was not referring to any anti-war demonstration.

THE COURT: Okay. So the one—again related [83] to Ms. Wyner?

MS. MALVERN: That's correct. But I believe it was that, I'm not sure, but I think it was the same play that she had been doing.

THE COURT: Do you know of any other history of nudity in state parks in terms of plays or expressive activities?

MS. MALVERN: We're all shaking our head around this table.

THE COURT: Which way?

MS. MALVERN: No. Sorry, no, Your Honor, we don't.

THE COURT: Well, do y'all want to—I have heard the arguments, read the cases, I want to take a couple of minutes and then I think I want to rule, so I can give you some guidance if you want me to.

The other opportunity would be for y'all to discuss it and try to resolve it. Do you want to try to do that? I'm going step out either way, I'll leave the phone open, I want to take a minute and look at some of what I have.

MS. MALVERN: I will confer with the client here.

THE COURT: Okay.

Why don't y'all confer, and then if you want [84] to talk with them, do it. I, frankly, have at least the beginnings of a draft opinion, so I will rule, but if y'all want to work it out, that is another route you could go.

Okay, I will give you about five minutes.

(Brief recess taken)

THE COURT: Okay, were y'all able to work anything out?

MS. MALVERN: No, Your Honor, we decided we would wait for your ruling.

THE COURT: Okay.

Well, I need to spend a little more time on a written order, but I know y'all are, I need to get it out, given the press of time on everybody, but I am going to grant the motion for preliminary injunction.

I won't repeat all the history, some of it will be in the written order, but it is apparent that on previous occasions Ms. Wyner's nude expression has been permitted and tolerated, although at different times grudingly, and that aspect of this case presents a very fact specific and worrisome concern.

I'm not prepared to rule at this point in the proceedings that this is a, that the decision was necessarily made with respect to content, but there are a number of aspects about it that are worrisome.

[85] First, the rule does appear to provide very broad, almost unlimited discretion, to the park manager in terms of

what type of free speech activity is allowed and which isn't. I note that the rule on its face at least seems to have the nudity ban relating to bathing activities and then it has a separate section on free speech activities.

The department has argued here that the ban is across-the-board and relates to free speech activities in every instance, and that may be the intention going forward, but that has not been the history, and some of the testimony is at least worrisome in that regard, that somehow an anti-war demonstration is different than a play, and I don't know that there was ever any—there isn't anything to reflect that the numbers would necessarily be different.

But, even if you apply an O'Bryan content neutral test, it does appear to me that there are alternatives that would be far less restrictive and could still meet the governmental interests, which would appear to be to protect beach-goers from being exposed to nudity, I presume beach-goers who aren't interested in nudity.

But they have done that in the past through the use of their signs and through use of the barrier [86] that the state used on one occasion, and so it seems to me that those avenues can well be explored in this case.

I want to make it clear in entering the injunction and directing that the defendants not prevent or interfere with her planned event that the injunction doesn't preclude the department, if it chooses, from using those kinds of signs they used in the past or some sort of barrier to warn people that might be at the park that if they, you know, that that is a, that there may be nudity involved in this anti-war protest.

But it is clear that her protest does involve expression, it's not nudity for nudity's sake, the nudity seems to be a significant part of the kind of statement she's attempting to make, and I think that, while at least to me it seems a bit strange to protest the war in that fashion, I credit her statements about

the vulnerability that it shows with respect to the war and the fact that there are no weapons.

And I note that there seems to be other protests of this type, so it does seem like this is expressive speech, and particularly given the history at this particular park, which I think began as a clothing optional park, and where she's been doing this for years, and I think that's well known to the community, [87] so I think that to ban it with respect to an anti-war protest is not in keeping with the First Amendment.

And so, for those reasons, I am going to enter an injunction. As I say, I will get it in writing so y'all will have the benefit of it.

It bothers me, I think there are a lot of issues in this case, and I don't like to try to decide, issues on this quick a basis, but I do feel like this meets the test of the injunction. The courts have said that loss of First Amendment freedom for even minimal periods of time constitutes irreparable injury.

It seems to me that, if suppression of an activity is unconstitutional, then allowing that to happen would be adverse to the public interest. I don't see that there's any great injury done, threatened injury to the department. It looks like there were no certain events planned for the park during the time of this event. It doesn't seem that logistical difficulties would be significant. And, for all of those reasons, I'm going to enter the injunction.

As I say, I think the issues are somewhat difficult. I am satisfied with respect to this issue, but in terms of some of the others, exactly how this rule should be construed, whether a, and we may not even have to deal with that in this case, but whether an [88] across-the-board ban that was evenly applied and applied where you didn't have the history you have in this case, whether that would be acceptable, I'm not prepared to say certainly today.

What's the situation—what's the department's position with respect to some sort of bond or surety? Is there any need for that here?

MS. MALVERN: No, Your Honor.

THE COURT: Okay.

And again, as I say, I am going to wait—I will have this ready in about an hour, but if you want to somehow resolve this, I always think it's better for people to resolve their issues themselves, because communication helps in working these things out, as y'all certainly have in the past.

But if you want to do that, fine. Otherwise, this will be, I will try to get this filed by five o'clock. If you want to wait around you can. Do you want me to fax it up to y'all? Would that help you?

MS. GUARD: Yes, it would I think, Your Honor

THE COURT: Okay.

I hope your fax is on the paper you sent us. I think it is I think we still have the fax cover sheet. But we'll send it to that fax machine.

Okay, thank you all for your argument. I [89] appreciate it. And particularly doing it on short notice.

MS. MALVERN; Thank you, Your Honor.

MR. MARSHALL: Thank you very much for your time, Your Honor.

(Hearing concluded.)

CERTIFICATE

I, Roger Watford, Official Court Reporter, do hereby certify that the foregoing transcript is true and accurate to the best of my, knowledge, skill and ability.

Dated this 28th day of February, 2003

/s/ Roger Watford
Roger Watford

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed APR 14, 2003]

Case No. 03-80103-CIV-MIDDLEBROOKS

T.A. WYNER and GEORGE SIMON,

Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.

ORDER ON MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss Count II of the Complaint (DE 13), filed March 25, 2003. The Court has reviewed the record and is otherwise advised in the premises.

In response to the present motion, Plaintiffs have indicated that they dismiss Count II of the Complaint without prejudice (DE 16), filed April 10, 2003. Accordingly it is hereby,

ORDERED AND ADJUDGED that Count II of the Complaint alleging violation of the Florida Constitution is DISMISSED without prejudice. It is further ORDERED that Defendants' Motion to Dismiss (DE 13) is DENIED AS MOOT.

DONE AND ORDERED in Chambers in West Palm Beach, Florida this 14th day of April, 2003.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

CASE NO. 03-80103-CIV
West Palm Beach, Florida
January 21, 2003 [sic]
1:15 o'clock, p.m.
Pages __ to __

T.A. WYNER & GEORGE SIMON,

vs.

DAVID B. STRUHS & TERRENCE COULLITTE,
Defendants.

TRANSCRIPT OF HEARING BEFORE THE
HONORABLE DONALD MIDDLEBROOKS,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Plaintiff:	James K. Green, Esq. Randall Marshall, Esq.
For The Defendant:	James Williams, Esq. Barbara Taggart, Esq. Christine Guard, Esq.
Court Reporter:	Roger Watford, RPR/CM. Official Court Reporter West Palm Beach, Florida

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[2] THE COURT: This is the case of Wyner versus Struhs and Coullitte. The case number is 03-80103. Let's start with appearances please.

MR. GREEN: James K. Green, cooperating attorney for the ACLU, West Palm Beach.

THE COURT: Good afternoon.

MR. MARSHALL: Randall Marshall with the American Civil Liberties Union of Florida.

MR. WILLIAMS: Jim Williams representing the defendants in the case with the firm of Williams, Langer & Cosby.

MS. TAGGART: Barbara Taggart.

MS. GUARD: Christine Guard with the Department of Environmental Protection.

THE COURT: Good afternoon.

Okay, well, this case is set for trial next week. There are some summary judgment motions pending, which I would be glad to hear further from you with respect to those.

I was curious, we had heard a rumor that you were close to resolving it. Have you thrown in the towell on that?

What is the problem?

MR. WILLIAMS: I haven't seen, Your Honor, that we are very close at this time to getting a [3] resolution. We had some discussions around the mediation a couple of months back. But I don't see that we're very close at this point.

THE COURT: Well, what's all this about? I was under the impression when it was initially filed and we granted the preliminary injunction that the primary motive for filing the suit was the protest or the performance the plaintiff wanted to make surrounding some sort of World Peace Day and she had the, they were doing this nude peace symbol, and that has come and gone. What's left? I thought that was the main focus of the case.

MR. WILLIAMS: It's my understanding, Your Honor, that the plaintiff has sought to make the injunction permanent so that she might have the ability to perform either similar demonstrations or plays or other performances out at this location at other times into the future, and we have had some indication, not confirmation, that that may be coming up in the reasonably near future again. So we don't have a situation where the issue has been resolved completely from our standpoint.

THE COURT: Well, Mr. Green, what—it was, I think we granted the injunction basically based on the as applied arguments, and the focus, I think really the [4] reason we granted it was there was a witness who testified basically the reason they didn't let her do it that time was, unlike the "MacArthur, The Man On The Beach", this was an anti-war protest, and that's what seemed to make the difference in the State's decision to not let her do it.

And so that didn't seem to be a very good reason. It does seem like a facial challenge, though, to their rule that you just need to have a bathing suit on if you are at the beach is not a very strong case, is it?

MR. GREEN: Pardon?

THE COURT: That doesn't seem like a very strong case, the facial challenge, if you take it out of the particular fact setting we were presented with at the injunction stage, doesn't seem like there's much left.

MR. GREEN: And we are not challenging the ordinance on its face. We are questioning its application to expressive activity that is at the core of the First Amendment.

THE COURT: But don't you need some sort of concrete facts for that? I mean it seems like you would need some particular facts to, that would give rise to it. I don't understand how you could decide that in a [5] vacuum.

MR. GREEN: I agree, Judge. I mean I can, if you direct me, I can tell you, you know, what we continue to offer to do and where it's falling apart. But there was some discussions at mediation and there, you know, I can tell you what we're willing to do right now, but I'm not sure that it's going to get us where we want to go.

We tried to settle this case right after the injunction and the defendants have taken the position that there are going to be no nudity anywhere on any state park beach in the State of Florida and they want to go to the mat on that.

And we are not challenging the facial constitutionality of a general rule against nudity. We are challenging the constitutionality of such a rule as applied to expressive speech, expressive conduct, that is at the core of the First Amendment.

And if you want me to, I can, I think I have distilled the arguments on both sides down to a fairly simple proposition.

THE COURT: Okay.

Let's hear from you on that, because I have a hard time understanding that in a, I guess just as a proposition, that there's some First Amendment right to [6] nude expression in state parks.

I mean, without the particular facts that gave rise to the last one, it seems to me if you let somebody, if you allow some nude expression but then draw the line at the anti-war protests, I don't have a problem with that case, that seems to be the case we had before, and I don't think you can do that.

MR. GREEN: Right.

THE COURT: But I'm not as convinced that you can say, well, look, we state parks aren't a place for plays or performances of any kind, if you want to do a performance you have to have your clothes on, why can't you say that?

MR. GREEN: Well, their best case is Pabst, City of Erie versus Pabst. That was a case decided by the Supreme Court a few years ago. In that case there was a general ban on nudity.

THE COURT: Isn't that a topless dancing case, though?

MR. GREEN: Adult entertainment case. And the Court there said that there was a four, two, three, but actually two dissents, I will call it a four to three decision, under Justice Scalia's concurring opinion they went, he just said it was a general ban on nudity, there's no First Amendment right involved, end of [7] story.

And if the Court adopts that, you know, that is one position, but that was not the majority decision in the Court. And it was a plurality and if you look, and you have to look, under the Marks against U.S. case, you have to look at the plurality decision as being the decision of the Court.

THE COURT: But even if you accept the plurality position in Erie, isn't there a difference between a state park where they have some I guess proprietary interest as opposed to just I guess topless bars and generalized ban against topless bars?

It seems like state parks, they ought to be able to have, there's a stronger interest with respect to state regulation. Otherwise, you get to the point where I guess every state park has to, if somebody wants to pursue some sort of expression that involves nudity, it has to be permitted.

Is that basically your argument?

MR. GREEN: I am not sure I heard that.

THE COURT: As I understand it, what you would say, you mean, but the topless bars have moved into this secondary effect and zoning and all that, and it seems like I guess every community has to, I guess can't preclude it entirely, it has to have at least some [8] avenue for that.

MR. GREEN: Right.

THE COURT: But that's private property. People wanting to perform plays, isn't there a difference between those cases and a state park where you just have a uniform rule that you can't have nudity?

MR. GREEN: There is a difference.

First of all, with respect to adult entertainment, the courts have held that that is an outer ambit of protection, and what Pabst was was an adult entertainment case, they said at least with respect to adult entertainment there's this general ban passes constitutional muster, it does not violate the O'Bryan test. You know, they talked about secondary effects, they talked about all sorts of things in Pabst.

And again I am talking about the plurality. But the plurality was very careful, as was the dissent, to note that they weren't dealing with theatrical productions like "Hair", they weren't dealing with "Equis" or "Oh Calcutta" or "Ballet Africante". The Court was very clear about this not being that kind of speech. Adult entertainment is not a theatrical production and it's certainly not an anti-war protest.

And in weighing, there are interests that the [9] State has in preserving the park for competing uses. This is not a single use park. This is a multi-use park.

The Eleventh Circuit in Maturest [sic] Society held that this very park was a public forum for, traditional public forum for expressive purposes, for speech, for demonstrations, for protests, so we are dealing with, as Your Honor noted in the opinion, a case that has some history.

And we have a decision from the Eleventh Circuit that this is a public forum. Once you start o with a public forum, they can impose reasonable time, place and manner restrictions, and the question for Your Honor, I will try to get more specific about where, what we could have done in this case, which is take a voluntary dismissal, we could have taken a

voluntary dismissal and worked out other terms, that would have been fine, we could have come back to Your Honor early next month with our next protest, and the next protest is going to be an anti-war protest. And I believe it's based on a Salvadore Dali play, but we can talk about that, but we are seeking nominal damages.

We have done everything that we can to narrow the focus of this case and not take any more court time. We have waived jury trial, we have waived any [10] claim for damages in excess of twenty dollars. We have done everything we can to try to narrow the issues and to not burden the Court with future litigation.

And the reason we will be seeking a permanent injunction in this case is the State has taken in its papers filed in opposition to the preliminary injunction and continues to take in its motion for summary judgment the position that it can ban nudity everywhere in every park, and while it does have a significant interest in allowing the park to be used for many uses, given the political nature of the speech, which is at the core of the First Amendment, you have to give that considerably more weight than the Court gave the interest in dancing nude in Pabst. The Court was pretty clear about that.

Since then there have been a couple of other decisions that have interpreted Pabst and have held that ordnances or rules, laws that constitute general ban on nudity cannot, are overbroad to the extent that they apply to I think theatrical productions and certainly in this case political protests.

THE COURT: Is there any case dealing with a, some sort of nude expression in a park or public forum?

MR. GREEN: No. But there's an Eighth Circuit case and I believe a Fourth Circuit case that deal with, and I can provide Your Honor and opposing counsel copies [11] of these later, one is Giovanni Carondola, 303 F.3d, 507, and there's another case out of the Eighth Circuit which I am looking for

and don't seem to have my, can't seem to put my hands on, which says that essentially that broad bans on both in public and private nudity or places open to the public nudity violate, it's actually City of Lincoln, Ways against City of Lincoln, 274 Fed.3d, 514.

Both of those cases are distinguishable to some extent, but the Court did hold that the general bans on nudity were overbroad as applied to theatrical productions and they didn't discuss political protests. And here we are dealing with both a theatrical production, it may not be the kind of play I would spend fifty dollars to go see or a hundred dollars to go see in New York, but it is a theatrical production, and there's also a political protest, and the political protests are going to continue.

On February 14th, you know, my client intends to put on a theatrical production, I think based on Salvadore Dali, that is against the war, that protests the war. And even if we took a voluntary dismissal we would have to come back here for another injunction.

THE COURT: It seems like parks are different, I mean most people, you are correct, it's perhaps [12] multiple use, most people go there for, to go swimming or bathing, that kind of activity.

All those other theatrical productions or topless dancing or all of those cases are essentially located in a forum where people who want to see it go there and see it as opposed to a park where most of the people who are there didn't go for the purpose of seeing these protests or these nude protests.

Doesn't that make a difference in the analysis?

MR. GREEN: Well, perhaps if we were dealing with a very small single use park like Stephen Foster State Park up in the northern part of Florida where they have every year, you know, festivals for music.

THE COURT: Because the State apparently did try the route under your consent decree of, you know, put a screen up and leaflets and if somebody wanted to go see it that was there at the park they could. Apparently your client didn't want to do it that way and ignored the screens and felt that was an unfair restriction on her ability to do this.

MR. GREEN: There have been screens put up in the past. In fact, there was a screen that was put up on February 14th of 2003.

THE COURT: But they ignored it, didn't they? [13] They set up in front of the screen, as I understand.

MR. GREEN: They, in effect, ignored the screen. There obviously will be some testimony about the failure of any state official to tell Ms. Wyner that she had, where in relation to the screen she had to be, there's absolutely no communication whatsoever to Ms. Wyner about that.

But, you know, it may have been obvious to everyone there who went to the protest, and there were a number of people who went to the protest, what the purpose of the screen was.

But under the United States versus Baugh case, which is cited in our papers, the remedy to violations of reasonable time, place and manner restrictions is not to ban the speech, it's to enforce the regional time, place and manner restrictions. That's what Baugh says.

You can't deny free speech because of either past conduct or anticipated future breaches. You allow it and then you regulate through either warnings or arrests and prosecutions the violations of the restrictions as long as those are reasonable time, place and manner restrictions.

That's what Baugh says, the Ninth Circuit case cited in our papers.

THE COURT: But how this would work then [14] would, any state park presumably, while you could have a time, place

or manner restriction, you would have to allow nude expression, don't you end up almost in those topless bar situations where you end up almost zoning every state park setting aside some space that would be available if somebody wants to perform this type of protest?

MR. GREEN: That would certainly be one response that the State could adopt.

THE COURT: I mean isn't that the inevitable end to that type of ruling?

MR. GREEN: Not necessarily. I mean, as I said before, there are some nature preserves that are just, you know, where there's no recreation allowed, and we have dozens and dozens of state parks in Florida, what we, some of them like the Stephen Foster Park is, you know, an outdoor area that is used primarily, when we talk about expressive activity, for music festivals.

You have other parks that are accessible only by boat. You have other parks, like John Pennecamp Park, that is mostly under water. You have all different kinds of parks in the State of Florida.

This park, the John D. MacArthur Beach State Park, is a multi-use park. If you look at the deposition of Terence Coullitte, he was the defendant in [15] this case, he said there are many uses, you've got a nature center, you've got an auditorium, you have people snorkling, you have people, you know, you can go on to the beach, you got people going on nature tours, there's a lagoon, on the west side there is the Munion Island which is kind of a mangrove area.

Then you've got the beach. And we're dealing with free speech on the beach. And this is an area that is approximately a quarter to a third of a mile north of the boardwalk.

THE COURT: Okay. Well, let me hear from the State on this issue.

MR. WILLIAMS: A couple of issues, Judge, if I, just to respond. I think one interesting case that might be helpful here is the Clark versus Community for Creative Non-violence case. It's a case that took place up in Washington, D.C., and the issue there was this Community for Creative Nonviolence wanted to come in in a protest against or a protest benefiting the homeless, they were going to set up tents and sleep on the mall in Washington, the U.S. Parks Service said we don't let people sleep out here, and that is the issue that went up.

And what the Court said in that case is that, irrespective of the nature of the political speech [16] there, you know, these rules were in place, as long as a rule is a content neutral across the board ban on conduct, not on speech, not on the expression that is the focus of the demonstration—

THE COURT: That just gets to the definition of it. Sleeping isn't part of the protest. I mean her contention is the nudity is part of what she's, part of her expression as opposed to, so it seems like that the tents on the mall case doesn't really help. I mean, it may be that expression doesn't include nudity, and that is I guess Scalia's point, but if it does how do you deal with it?

MR. WILLIAMS: With all due respect, Judge, I think that is the point. And what the courts have said over and over in a number of cases and what the Supreme Court—

THE COURT: What's the point?

MR. WILLIAMS: That nudity is not part of the expression.

THE COURT: Yeah, but what about a topless dancing cases? They have over and over said that that is, although it's at the outer fringes. What's the difference about that and what she's doing?

MR. WILLIAMS: Actually if we look closely at the topless cases, Judge, City of Erie is a good example [17] and I have

that one in front of me now, the Court starts out there by saying that being in a state of nudity is not inherently expressive conduct.

If I can get right to the page here, I don't see the quote I am looking for, but they say repeatedly in that opinion that that is not the conduct protected by the First Amendment. The conduct that is protected by the First Amendment in Erie is the dancing. The nudity itself is not what's protected.

THE COURT: Right. But I mean again that is not what—she says nudity is part of what she's doing, her performance, at least the peace symbol, that was, you know, she was trying to portray this vulnerability and that was an aspect, in the same way I guess the nudity is part of the dancing, an aspect of the performance.

MR. WILLIAMS: She does say that, Judge, and it's clear that Ms. Wyner has taken that position in this case.

We think the position is flawed. What we're dealing with here, she's putting on an anti-war protest and the core of what she's doing is she's creating a peace sign and that is the message.

Her choice to perform that in the nude is something that she thinks adds something to that and she [18] will tell you and has testified in this case that that shows vulnerability and all these kind of things.

We believe that if we look at the cases and apply them to this factual pattern here, if you have Ms. Wyner comply with the bathing suit rule in this case, what does she do? She puts on perhaps a thong and bikini top. Does that detract in any significant way—

THE COURT: Isn't that the same argument, though, in the topless dancing, if you put on a shirt you can do the same dance? I just don't see how that is a distinction that you can make at least in terms of the expressive part of what she was

doing. I mean I guess I see your point, you are arguing for the Scalia or Easterbrook rule, which is just nudity is not part of expression.

MR. WILLIAMS: Even in the plurality opinion Justice O'Connor wrote in that, in the Erie case, Judge, they talk about the idea that putting on, in that case I think what they required was pasties and a G-string, if memory serves, and they said the de minimus effect of requiring that these people put on that insignificant amount of clothing does not take away from the message, which is the erotic dance.

Likewise, in our case to require someone whose primary message is one of peace that they are trying to [19] show through this peace sign, by having them do that with a thong and a bikini top does not in any significant way take away from the idea of vulnerability.

There's certainly not going to be a suggestion out there that anyone is hiding a weapon in skimpy clothing like that. And the Erie case is pretty clear on that point. I think the other cases along those lines support that same argument.

I found it interesting in looking at this case, there doesn't seem to be any case out there that addresses this specific issue in a context that is really truly analogous here, and I think the reason for that is because, you know, the idea that the Supreme Court has posted is that it has to be a content neutral analysis, and that's why you don't have much of a distinction in the case law between topless dancing and a political demonstration.

We could, probably everybody in the courtroom here would agree that, you know, in a vacuum it seems like the political demonstration ought to get more protection than the topless dancing, but in point of fact what the courts have said is if it's a content neutral analysis, what you are doing is you are looking at the rule to see if the rule was promulgated for

[20] reasons that don't have anything to do with the content of the expression.

The other cases, as you know, the cases where, dealing with the "Hair" play, for example, and some of those cases, none of those are in the same kind of a context. Those, some of those cases involve prior restraint issues where they came in and they had, I think in the "Hair" case there was a public theater there and they were letting everybody else use it and they came along and, based on the content of this one play, they said, no, you can't use it, and they didn't have a very good evidentiary basis for it, another distinction from the case that we have here.

We think, Judge, that a trial in this case will allow us in a way we were not able to do on very short notice for the emergency hearing to distill some of the reasons why the statement is concerned, to distill better for the Court the reasons why the rule has been applied, and those kind of things.

THE COURT: Well, I guess I am not clear on what the factual disputes are. What are we going to distill? I mean we, as I understand it, you had a consent agreement that you were following, it's unclear to me how long that was supposed to last, but in any event, apparently whenever she wanted to perform she [21] called the park and they would say come on out, and she did it for several years, didn't she?

MR. WILLIAMS: That is an excellent point, Judge. That agreement actually dealt with a single performance that was to take place back in 1996. In point of fact, what the facts will show is that from that time forward, first of all, if I recall correctly, I believe it's addressed in our responsive briefs in this case, even on that instance she didn't perform behind the screen, she hasn't performed the play a number of years until this last year.

The facts that will be presented will show she has only performed the play in the nude one time since 1996. She hasn't come out there on a number of occasions. The facts, as distilled in the trial, will show in point of fact she was told as early as 2001 that she was no longer going to be allowed to go out there and not be in compliance with the bathing suit rules. There's correspondence to that effect.

The park service decided back in 2000, which ironically is about the time Erie came out, that an across-the-board ban, not ban but across-the-board bathing suit rule, if you will, requiring a certain amount of clothing in these parks, was going to be the standard in the future. And the law supports that.

[22] You have commented earlier today that, based on the testimony that you heard last February, there seemed to be some distinction by the park between the play that had been performed in the past and this demonstration, and I apologize to the Court, we were on very short notice, the way we presented our facts may not have been everything we wanted on that day.

I think what the facts will show in a trial is that there is no separate analysis, everyone is required to adhere to the bathing suit rule, and—

THE COURT: Well, I think you will be repackaging facts. I mean I asked the question. I asked him, what's different about this one that you can't, you didn't want to let her do it? He said this one is an anti-war protest. That is what your witness said. I guess you can dress that up in some fashion but that is pretty much what he said. Is what you are saying he is going to have e better story this time?

MR. WILLIAMS: Judge, what I am saying is that the guy that got called on on a few hours notice to testify last year might not have had all of the facts at his disposal that he should have before he came in and testified.

I think that the facts, as they have been distilled in depositions in this case and as they will [23] come out at trial, would show that, in fact, irrespective of what Mr. Scalco's perception was, that, in fact, the ban on nudity in state parks has been applied evenly for all purposes since 2000.

THE COURT: Okay. We all—what facts are in dispute here? I'm not sure I understand about distilling facts. What are the facts that we need to have a trial for?

MR. WILLIAMS: Well, we talked in our opposition to the plaintiff's motion for summary judgment, Your Honor, about a number of fa[illegible] that we dispute as set forth in that motion for summary judgment, if I can put my fingers on it.

THE COURT: It looked like mainly, other than the classified immunity point, you argue the state is immune, but it's hard to—I don't see how that can be ripe with respect to their claim for injunctive relief.

MR. WILLIAMS: By the way, Judge, I agree with that with respect to injunctive relief. My argument was only with respect to any money damages.

THE COURT: And apparently they are only seeking fourteen dollars. But it does seem to me, I'll give Mr. Green a chance to respond, but it's hard to see why the park people don't have qualified immunity, so as I say, I think this case is really about an injunction, [24] and that is, since she did her performance, I guess I still, I'm still not clear why y'all are continuing to litigate this.

Go ahead. I interrupted you.

MR. WILLIAMS: I am struggling here to find our dispute of their facts in the record, which I read just a very short time ago, Your Honor. I know we have a difference of opinion as to whether or not the time, place and manner restrictions that have been applied in the future have been effective, and that is addressed.

As Your Honor has already alluded to, there has been an assertion by the plaintiff in this case that she has been threatened with arrest. We have never threatened her with arrest with respect to her request for the performance last year nor this year, for that matter. The letter we sent to her does not suggest she's going to be arrested.

Again, the plaintiff has repeatedly indicated she is not going to use the screen that has been put out there. There is a significant issue that seems to have come up concerning whether or not the parks have some interest in having people put on clothes, and it has been asserted repeatedly by the plaintiffs in this case that there never has been any harm out there.

There has been at least one deposition taken [25] in this case from a school teacher who was out there on the day of the demonstration last year who testified that her second grade class was denied the opportunity to go out and enjoy the beach.

There are a number of other anectdotal instances where patrons of the park have not gone out to the beach because there were nude people on the beach, times when people have left the beach because they didn't want their children exposed to this.

And before I pass this over too quickly, Judge, this really is the core of DEP's concern here. The majority of the citizens in the State of Florida are not interested in nudity in their public parks. You go to the public parks to participate in a variety of kinds of recreation.

In this particular park it has been well recognized it's primarily one of natural scenic beauty. There's not a lot of construction in this park. There's not a lot of volleyball and those kind of things. What we have primarily are nature oriented activities, nature classes, kayaking, fishing, going to the beach, swimming, snorkling, those kind of things. And that is very important.

I do not think that the Court had the benefit last year of hearing a good representation of the [26] State's concern with respect to park goers and citizens of the State who go out and want to enjoy these places without being exposed to the nudity that Ms. Wyner and her associates advocate.

There are, and I will just direct the Court, if it may help you, to our memorandum of law in opposition to plaintiff's motion for summary judgment, and beginning at page 2. There seems to be some dispute as to what relevance or what significance the comments of the attorneys for DEP have. You can find that at page 5 of our disputed facts.

THE COURT; I thought that went to the qualified immunity issue. Doesn't it? Isn't that the only place where there was some argument about what the lawyers were saying? I thought the plaintiff was arguing that basically the lawyers decided this, not the fellow or the park, and so therefore he didn't, that he wasn't entitled to qualified immunity. But I thought that was their argument.

MR. WILLIAMS: That was their argument I think for the purpose of a motion to compel seeking to have the attorney's work product declared available to them. I think the Court already determined that, for that purpose the, there was no waiver of attorney/client work product privilege.

[27] THE COURT: But what the lawyers said or didn't say, why is that a factual dispute that makes any difference?

MR. WILLIAMS: We think it is not relevant and it's not part of the case, Judge. But the plaintiffs have asserted that it is an important aspect of the case in their motions.

THE COURT: Well, tell me what you think is a factual dispute we need to concern ourselves with.

MR. WILLIAMS: Other than those things we have already mentioned, Your Honor?

THE COURT: Well, you said to show how strong the State's interest is in a park. I'm not sure that—it's hard to see how we're going to have a trial about that.

MR. WILLIAMS: Well, the testimony from various persons who work within the park about the reaction of patrons in the park of nudity I think is very relevant to determining whether or not there's any State interest that is being protected here.

The plaintiffs seem to claim when they refer to Terry Coullitte's testimony that there is no harm, we can go out there and we can put on this play, we can all have our clothes off on the beach, and nobody is affected by this, it doesn't cause any problems.

[28] And, as a matter of fact, you know, historically what we have seen out there, if we are going to go down the path of sort of historically what has happened out there, there were a lot of problems, legal problems, when nudity was first banned at the park, and then moving forward more recently we have less of those more sexually explicit problems.

We have a very serious problem with people who enjoy this park for what it is, an area of natural beauty, scenic area that they can go and enjoy, and they go out there and they are completely denied the opportunity to use any area that's even reasonably close in proximity to where Ms. Wyner and her associates are putting on their performances, and we feel that is something the Court has not heard a lot on lately or has not heard a lot on in the initial hearing and may be relevant to the Court's determination of, under the O'Bryan test, whether or not the State has an important or substantial interest that would allow them to put forth the regulation that they have.

THE COURT: Okay. So the importance of the park. Anything else that you think we need to hear evidence about?

MR. WILLIAMS: The effectiveness of various time, place and manner restrictions which have been [29] discussed in the past and which were discussed ad nauseam during the hearing last year, Judge, is an important issue that I think the testimony needs to be taken on.

THE COURT: That's basically what, just whether a screen works, is that—is there something besides that?

MR. WILLIAMS: Whether or not a screen or anything else out there short of this rule would be effective given what has been the position of Ms. Wyner and her associates with respect to where they can do their performances and how they can do their performances.

If you could bear with me just a minute, Judge.

(Pause.)

As the case stands now, it looks like there may be some issue as to what Terry Coullitte's duties and responsibilities and functions are and what represents a discretionary responsibility and how far his authority goes.

It occurs to me that in the plaintiff's motion for summary judgment they have challenged the extent of Mr. Coullitte's authority and so the Court probably needs to hear from Mr. Coullitte on that issue exactly [30] what it is that he does out there and what the extent of his authority was.

There seems to be some discussion, although not a lot I guess at this point, as to what the, procedurally how the correspondence came back to Ms. Wyner indicating to her that she was not going to be allowed to violate the rule. She would be allowed to hold a demonstration, but she would not be allowed to violate park rules, and specifically the bathing suit rule seems to be an issue.

This relates a little bit to what we talked about before, but the extent of the scheduled activities out there at the park, whether it's other plays, school children going out there, field trips, those kind of things, seems to be a small issue.

Weddings I guess have been suggested as something that goes on, workshop stills, there, I think for the purpose of determining what is an appropriate kind of restriction out there, the details of what happened last year and what has taken place in the past when Ms. Wyner and her associates came out to perform these various plays and demonstrations would be a factual issue.

I believe we provided for the Court the unit management plan for the park, which includes the [31] appropriate uses for the park, puts the acquiring of the park into some historical context with respect to its conservation nature, the reason it was donated in the first place.

THE COURT: Well, was she wrong about all that, MacArthur used to like to go out there and skinny dip, that's traditionally what the beach was partly used for?

MR. WILLIAMS: I don't know that I would go so far as it's traditionally what the beach was used for. There seems to be ample evidence that Mr. MacArthur on some occasions went out there and skinny dipped.

Whether he did that frequently or not is something I've not seen any evidence of. It certainly is clear that there were a group of people back when the place was known as Air Force Beach who considered it to be a place where they could go out and take their clothes off to sunbathe or do whatever they wanted to.

The testimony from the folks from the DEP, Your Honor, would reflect that once the park was deeded over to the State and the State came in and began enforcing its regulations they found a world of problems with criminal activity that was going on out there, and over some period of time that has been taken care of. Of course, because of reinforcement of the laws and [32] regulations, a lot of that has gone away.

And while I don't think that I would agree that the facts will show that this was a nude beach, the facts will certainly

show that it was used in that fashion by a number of people for a number of years. We don't contest that.

THE COURT: Okay.

MR. WILLIAMS: You want me to continue, Judge, with respect to factual concerns?

THE COURT: If you have some more on them.

MR. WILLIAMS: There's going to be a significant factual dispute over whether or not Ms. Wyner knew or should have known about the restrictions imposed last year when she put her play on outside the screen, not play, but her demonstration.

THE COURT: When you say last year, you mean after the injunction, what do you—

MR. WILLIAMS: Yes, sir. There may be some question as to whether or not these regulations are endorsed in other parks around the state. The evidence from the State would be that they are, they have been.

There apparently is going to be a factual dispute over whether or not Ms. Wyner made a conscious decision that she was going to intentionally not go behind the screen.

[33] I guess, and I don't know if this is the case or not, but maybe there's going to be evidence of what the plans are this year, and we need to put on evidence to address how that might impact the park. That is going to be something we're going to handle here.

And we too, Judge, like Mr. Green, would encourage a resolution to this matter short of having to go through this process of having temporary restraining order motions and emergency hearings.

We think it's probably not the best way for us to present our evidence to the Court. We think it's disruptive to the Court. I can tell you it's disruptive to the State and its agencies. We need to have some resolution of it.

THE COURT: And you don't think you can just—I mean it seems like y'all were, for the most part, y'all were able to work together to accommodate these varying interests before the last injunction. It has been several years it seems like where you were able to work things out to mutual satisfaction.

MR. WILLIAMS: My understanding, Judge, is that after the 1995 agreement was reached with pending litigation there was not an awful lot of discussion. It's easy in reading some of the materials to get the impression that Ms. Wyner has been out there on an [34] ongoing basis, you know, year in and year out, maybe more than once a year, something like that. That is, in fact, not the case. She's actually only been out there, that we know of, or we have any discussions about this, on two or three occasions since 1995, and—

THE COURT: I think that's what we—that's what the testimony was. There might have been an argument over one time or another, but I think two or three was essentially what y'all said. But she had been able to call your park people and apparently do it at least on those occasions.

MR. WILLIAMS: It's my understanding she only performed the thing in the nude on one occasion between 1995 and 2003, if I understand correctly, Judge. Perhaps on two occasions. And, you know, it's interesting, we have heard a lot of talk in the case about the State violated its agreement from 1995. First of all, the agreement was for one year, so—

THE COURT: Does it say that somewhere?

MR. WILLIAMS: Yes, it does. The agreement in its very, in the language there, talks about I think a specific date when this demonstration—

THE COURT: Where's that? Why would you set up all that procedure if it was just for one occasion? I don't remember seeing a date on it.

[35] MR. GREEN: It specifies February of 1996. But nothing to limit it to that. And the reason we set up the procedure was, they went to 1997 and at least one other year beyond '97. But in any event—

MR. WILLIAMS: The irony of all that discussion, Judge, is that it is Ms. Wyner who has repeatedly refused to abide by the time, place and manner restrictions that were established in good faith back at that time.

THE COURT: I'm sorry, I was reading something. What was your last sentence?

MR. WILLIAMS: I said the irony of this discussion about the State somehow violating this agreement is that it's Ms. Wyner who has consistently refused to abide by the time, place and manner restrictions agreed to in that back in 1995.

THE COURT: You mean the part about the screen not, refusing to be behind the screen, or what?

MR. WILLIAMS: That's correct, Your Honor.

THE COURT: All right.

Okay, Mr. Green, in terms of factual disputes, what are they, and do we need to have a trial?

MR. GREEN: Your Honor, we do not believe there are any material disputed facts. There might be some nuances the parties disagree about, but the facts [36] themselves are, material facts, are not in disagreement.

If I could go through a couple of the issues Mr. Williams raised, first he said, well, Mr. Scalco, who was Peter Scalco, who was the witness who testified at last year's hearing in February, didn't really know what he was talking about. That is totally inaccurate. He was the, in fact, just a few months ago he was the State's designee as the person with the most knowledge on behalf of defendant Struhs, who is the head of DEP.

Mr. Williams talks about some issues of relevance. There's some disputes about certain facts. But relevance is, if the fact is irrelevant and it's not material, if it's not material it doesn't count as a disputed fact for summary judgment purposes.

I think it is his purpose to—he talks a lot about the use of the park. We stipulate that the State has a significant interest in allowing the park to be used for many different uses.

In fact, if you look at defendant Coullitte's, the park manager of John D. MacArthur State Park, he testifies at length; A, there is a park management plan; B, the park management plan, which I believe the defendants have provided and is part of their summary judgment papers, contemplates multiple uses not just in [37] other parks around the State but in particular this park. There probably are 10 or 15 different uses that are contemplated.

Defendant Coullitte has indicated at his deposition, and the deposition is part of the summary judgment papers on file, that, if I can just get out the motion in limine, in the motion in limine, Judge, Mr. Coullitte says, oh, he could have managed the use of nudity, he didn't think there was a particular problem with public nudity at the park, he could manage it.

THE COURT: But they passed a rule against it, though, didn't they?

MR. GREEN: There was a rule against it back when the stipulation was entered into in 1995. There was a rule that, there's a rule enacted back during the Nature Society versus Philion litigation.

THE COURT: But the stipulation, I'm not sure I understand your point, I mean they did enter into a stipulation where they have this, Part 2, they recognize nudity coupled with expressive activities is generally protected by the First Amendment, but that—

MR. GREEN: He says the rule was in effect when they signed that stipulation. There hasn't been —

THE COURT: Are they locked into that? Basically there have been some changes. Whether or not, [38] whether, maybe they were unwise to have signed that if they wanted to keep enforcing their bathing suit rule, but. . .

MR. GREEN: Well, Judge, actually we don't think there has been a change in the case law with respect to innocent nudity associated with either political expression or theatrical productions.

THE COURT: Well, if somebody wants to put on "Hair" out there, a company decides we are going to put on "Hair" out at the park, is it really, it has to be a time, place or manner restriction and that is a use that the courts should enforce?

MR. GREEN: Yes. And, for instance, "Ballet Africana" was I believe performed at a public beach or a public park at Long Island.

THE COURT: What is that?

MR. GREEN: "Ballet Africana" is an African based ballet and performs in public places, and that goes back almost 30 years ago, if my arithmetic serves me right. "Ballet Africana" was permitted to perform in public spaces and that involves nudity. Again it's a theatrical production.

If I can go back to a point I started to make, and I don't think I made it as clearly as I would like to have, Pabst says general bans on nudity as applied to [39] adult entertainment do not violate the First Amendment. That's what they said. They also make it clear in the majority opinion that, at least two occasions, that adult entertainment or dancing, you know, in the nude for adult entertainment purposes is at the outer ambit of the First Amendment.

The Court was careful to note in a couple of places by the majority opinion and also in the concessions made by the

lawyer for the City of Erie that it did not, that the ban did not apply to "Ecquiese," did not apply to "Hair", did not apply to "Oh Calcutta" or other theatrical productions. We cite that in our footnote, which I believe is footnote number 2, in our reply to defendant's motion for summary judgment.

The Court there said there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message.

The majority said, "Even though we recognize that the First Amendment will not tolerate the total suppression of erotical materials, they arguably have some artistic value. It is manifest that society's interests in protecting this type of expression is of a totally different and lesser magnitude than the interest in untrammeled political debate." This is from the majority opinion in Pabst.

[40] They go on to say, "Few of us would march our sons and daughters off to war to preserve the citizen's right to see erotic adult entertainment." Then the dissenters note that the City of Erie's counsel stated that the general ban would not apply to productions such as "Ecquiese," "Hair", "Oh Calcutta."

And then if we go on to the Ways case, the Eighth Circuit—

THE COURT: Is there any case that has applied that in the context of a forum that is basically opened and freely accessed by people, by—for example, could you do this in Grand Central Station or Florida Field or any of the other—

MR. GREEN: Well, Grand Central Station would be more like the Ishcon case, the Minnesota Fair case, where you have a lot of traffic that's moving through.

THE COURT: So what's the, the State's interest is movement of traffic, is that the distinction?

MR. GREEN: Movement of pedestrians, you know, you have to move a lot of people through quickly. And also in the airport solicitation leaflet cases the courts have said, well, solicitation when you've got a lot of people moving in and out, solicitation, it was a five-four decision flipping, solicitation can be banned [41] because it takes more time, leaflets in an airport cannot be banned because it takes less time, the interest in moving pedestrian traffic through an airport and the, you know, I guess I call them the Hari Krishner cases.

Then there's the Minnesota, I think it's called Ishcon, the Minnesota Fair case, where they talk about the interest in moving large groups of people through the Minnesota State Fair. So you have a traffic situation, a pedestrian traffic situation, and the Court says that is a very significant interest.

Here we've got the, their own park manager, the defendant in this case, Coullitte, saying he could have managed this, consistent with all the other multiple uses at the park. That is his testimony. And it's undisputed.

And so we don't have a problem like an airport, we don't have a problem like Grand Central Station, Minnesota State Fair or even Lafayette Park, which is right across from the White House, where you have all the national security concerns.

This is a quintessential public forum open to multiple uses.

THE COURT: But I guess the nudity has virtually or very little contribution to the [42] expression. I mean assuming it has some.

MR. GREEN: In our case it is absolutely core to it. You have nude peace signs being performed by—

THE COURT: That case is over, unless—it seems like the common theme of the plaintiffs is just the nudity. I mean she—

MR. GREEN: No.

THE COURT: —there have been a number of variations, but the "MacArthur, The Man And The Beach" versus the peace sign, it seems like the common denominator may be the nudity rather than the expression.

MR. GREEN: Judge, I hate to say this, but I have been doing these cases for 25 of my 27 or 28 years of practicing law, starting with the Nelson case, the McGuire case, the Duese case, the Simon case, the naturist case, the T.A. Wyner case, and yeah, nudity, the skinny dipping, the traditional use that this park was used for has been at the core, and this is not just nudity in the abstract, this is nudity tied to a particular place.

We have the Florida Supreme Court acknowledging—

THE COURT: But the nudity, isn't that a different issue?

[43] MR. GREEN: Absolutely.

THE COURT: She's tying hers to the First Amendment here, and I might wish that freedom was broad enough to encompass some general right to nudity, but it doesn't look like it is.

MR. GREEN: I agree one hundred percent. And I can't, that's what the Supreme Court has said, that's what the Eleventh Circuit said in South Florida Free Beaches, but South Florida Free Beaches, followed by all of Florida's Supreme Court and District Court precedence, has said that nudity standing alone is unprotected but nudity coupled with other expressive activity is protected. And here we have theatrical activity, expression, and we have political expression.

THE COURT: But this is the only one where I am aware of where you are not in a facility where basically people who don't want to go just don't go. I mean a topless bar, you can uphold an 18-year-old limitation or 21, whatever the limit is, plus anybody that goes there chooses to.

And the same thing with "Hair" if it's in a theater. But a lot of the people who might go to the park, most have no interest in it, some would be offended by it, and I guess a few want to participate. So isn't that really what the State is confronted with?

[44] MR. GREEN: Well, that's what the State says it's confronted with.

THE COURT: Isn't that a fair—

MR. GREEN: Mr. Scalco said, well, the plays might be protected but not the anti-war demonstrations.

THE COURT: Well, except we're not in that circumstance now. At some point they ought to be able to make the decision without dealing with the history. And that was the reason for the injunction. That issue is now moot, isn't it?

I mean, we entered a preliminary injunction that was of a certain duration, she did her play, and so it seems to me the danger at least that we saw then, which was a decision being made based on content, is no longer present.

Here they say, well, we just want to stop the nudity regardless of what kind of play she wants to do. It seems like if there's ever a time for them to present the issue in that fashion it would be now if they can ever get away from their history.

MR. GREEN: Well, I didn't write the opinion that Your Honor wrote. In your opinion you indicated that nude overtly political speech—

THE COURT: Yeah, that line was a little broader than probably I contemplated at the time.

[45] MR. GREEN: Well, but the fact of the matter is, Judge, you know, we—

THE COURT: I mean I, the opinion could be read different ways, but really the reason for the opinion was his testimony

that this is, we can't do this one because it's an anti-war protest, that was the driving force behind the preliminary injunction.

MR. GREEN: Right. But since then we have gotten testimony from the park manager who says, first of all, I will say, A, this is a public forum, B, notwithstanding the fact that it's a public forum, the State has a significant interest in maintaining the use, a solitary use or a multiple uses, and if it wants to maintain a solitary use then it has to enforce the voluntary use, but once it opens itself up to multiple uses it can't—

THE COURT: Can't you still look at the purpose of the forum? I mean this isn't a state theater. I could see the argument if this was a, it's a, I don't know if they still have them, a state theater where they allow people to come put on all kinds of plays, and if she wanted to put on a play there, there would be, seems like, stronger argument than at a park.

MR. GREEN: That would be a designated public forum and this is a traditional public forum and, if [46] anything, the protection is greater at a traditional public forum than a designated public forum such as a state theater. That is the law.

And if the State just wanted to make this a nature preserve, all you can do is just walk on the boardwalk and look at the nature, it might be able to get away with that. That would probably constitute a significant interest, a substantial interest. However, once the State opens itself up to multiple uses like this and its own park manager says, "I could manage her, I could manage this use and the other ten to fifteen uses—"

THE COURT: What does that mean, though, when he says "manage it"? Does that mean we can just, that there's enough room to separate the crowds, or he would put up signs saying, you know, if you are not interested in nudity don't go down there, is that basically what it is?

MR. GREEN: He could put up signs, he could move them farther north, which would be beyond a point where you could see them from the boardwalk.

Actually, if you go out there, Judge, you know, if you are going to do anything you might want to go out for a tour of the area, if you are on the beach, I mean if you are on the boardwalk and you look out, [47] there's a point that goes around, you can't see beyond the point from the bottom of the boardwalk. So he said, "I can put them out there, you know, I could place them out there."

He also indicated that, this is in the record evidence that was I think even provided by the defendants, he could manage these uses, he didn't have a problem with skinny dipping, he didn't have a problem with nudity, he just didn't have a problem with it. He thought that. You know, this is their own park manager testifying.

So I would agree that there are some hypothetical situations like a nature refuge with a very fragile habitat where you could limit people to walking on the boardwalk and not making any noise, not doing anything else to disturb the fragility of the habitat. We are not dealing with that situation here.

We also have evidence that they have art shows, they have evironothons, other kinds of expressive activity out at this park, and he can manage the park, and he can manage these competing uses.

Getting back to the other issue about whether there has been a threat, that's not a factual issue. She has been arrested a number of times. There have been a number of other arrests at this beach. Morely [48] Schlostic, he got arrested. But, as a matter of law, we are dealing with expressive activity and specter.

There's good language in a case called ACLU against the Florida Bar, I think 996 or 999 Fed.2nd, and in that case the Court basically said that when a state official reminds someone of a particular law and appears to be enforcing that particular law, that is enough of a threat for First Amendment purposes.

THE COURT: Okay, where is the testimony by the park ranger that you refer to or the park manager?

MR. GREEN: It's in his deposition.

THE COURT: That's Coullitte's deposition?

MR. GREEN: It is in Coullitte's deposition. And Mr. Marshall will find that.

By the way, Judge, on Defendant's Exhibit 1 to their motion for summary judgment Mr., defendant assistant general counsel, says violation of any park rules is a misdemeanor which can result in arrest. And that is the January 23rd, 2001 letter that the defendants themselves attached to their summary judgment papers. If that is not a threat, I don't know what is. It certainly is a threat in this context under the ACLU against Florida Bar case.

In footnote 14 in our motion for summary judgment, page 14, we state that Park Manager Coullitte [49] testified that the setup of MacArthur Beach State Park is such that it can accommodate free speech activities that may involve innocent nonerotic nudity which would not be visible from the main boardwalk and that from his standpoint as park manager innocent nonerotic nudity would not present a problem. That is Mr. Coullitte's deposition, pages 83 to 84, and page 99.

And also another witness from the state parks said that the boardwalk is several hundred yards away from the protest area, an area making it impossible to see nudity with the naked eye. And all this is in, you know, footnote 14 with the references.

THE COURT: Okay.

MR. GREEN: So, Judge, as I indicated before, the State does have an interest. We stipulate to that. However, under the facts of this case, there are multiple uses allowed at this park, this is a traditional quintessential public forum that is held open for expressive activities, there is a very real connection between this beach that was owned by John D. MacArthur and the activities and the subject matter of the protest, there's a linkage between the message and the particular place.

Moving on to, I started to talk about the, I'm coming back now to answer a question that you asked me [50] point blank at the beginning of this argument, is there a case that has, post Pabst, that has allowed either theatrical expression or political expression in a public forum that involves innocent nonerotic nudity, and the answer is that I can't find one. I have looked through 120 cases post Pabst. I shepardized it. I can't even find a Law Review article that addresses it.

I spoke with Marjory Hines, who used to head the ACLU censorship project, who was quoted in a Ninth Circuit decision recently on, "The Medium Is The Message," and she says she's not aware of a single case. I just can't find one. So that is an issue for Your Honor, an issue of first impression, in the post Pabst era.

But in the Ways against City of Lincoln case, which I cited at the beginning, I just found this earlier today, the Court says on page 518, "Ballet and theater performances receive greater First Amendment protection than nude dancing and," whatever the ordinance was, "could have been enforced to prohibit the type of simulated sex found to be in productions of 'Hair.'

"The ordinance could also have been enforced to prohibit stage actors from kissing and ballet dancers or ice skaters from lifting each other up by the [51] buttocks if such acts

could reasonably be construed to be for sexual arousal or gratification of any observer or performer."

If anything, Judge, every witness in this case has stipulated that we are not dealing with any kind of sexual gratification here, we are not dealing with any kind of eroticism here, this is innocent nonerotic nudity associated with theatrical expression and political expression.

If Your Honor is interested, and Your Honor could hear testimony at the, at a summary judgment hearing, I don't know if you want to, Ms. Wyner did arrive a little late today, she can testify as to what she intends to do on February 14th, which is another anti-war protest. It will not involve I believe a peace symbol but, you know, I haven't really discussed that with her in full. But there will be another anti-war message as well as a theatrical production.

I think it's also, getting back to the multiple uses, any use, including expressive activities, could interfere with other visitors' enjoyment to the park. If I don't like a message, I don't want to see a bunch of Klans people marching on the beach, I'll just go the other way. Klans people, the KKK, could and should be allowed to protest at this beach.

[52] Another protest that could happen in an anti-war context is for, frankly, I think it would bother people a lot more, perhaps interfere with their enjoyment a lot more at the beach, would be for the protesters to pour blood on themselves. That would be very provocative kind of protest.

But the courts have made clear that the purpose of the First Amendment is to encourage robust debate and thought about core issues and was designed to secure the widest possible dissemination of information from diverse and antagonistic sources.

There are other uses, there are other expressive activities, that would be offensive, that might interfere with my personal

enjoyment of this beach. I can imagine any number of messages. It's still a traditional public forum which is held in trust from time in memorial for expressive activities, Hague versus CIO, I'm sure Your Honor has uttered those words many times. That's what we're dealing with here.

And I do agree that, with Mr. Williams, that there should be a decision, we believe there should be permanent injunction or declaratory relief, we do believe that the 1995 stipulation was not limited to the February of 1996 performance, but I don't think we need to reach that issue at this point.

[53] THE COURT: Well, procedurally, is there any need, assuming I disagree with you on your facial challenge, we have already entered the injunction as to the performance, which is over, is there a need to deal with that in any fashion?

MR. GREEN: With respect to the—

THE COURT: The one she did last year. That has expired of its own I guess terms.

MR. GREEN: Right. That is a—

THE COURT: I mean normally you end up, when you have a preliminary injunction you would, assuming the ruling remains, you would make that a permanent, but when the event has come and gone, what procedurally should you do?

MR. GREEN: Well, where you have an ongoing series of arrests, threats, litigation, settlements, this appears to be an appropriate case for permanent injunctive relief or at least declaratory relief, indicating that expressive activity or nudity, innocent nonerotic nudity associated with political expression or theatrical expression is protected by the First Amendment and cannot be banned.

THE COURT: I understand that is your position. But if I were to believe that essentially the reason for that ruling was the particularized decision [54] the State was making based

on the anti-war content at the time, yet were to believe that on a, in terms of a general rule, they can maintain their bathing suit ban in a state park, procedurally how do I deal with the preliminary injunction? Is it just—has it disappeared? I mean you were a prevailing party.

MR. GREEN: Right.

THE COURT: In terms of the case. At least as to that forum.

MR. GREEN: We understand.

THE COURT: But I'm not—it's not clear to me what, if anything, we need to do with respect to that preliminary injunction and that issue in any kind of final decision.

MR. GREEN: We have attempted to work the case out along those lines, but we have not been able to.

THE COURT: But in terms of, I mean y'all have been able to, but if I were to try to deal with it, how would I do it procedurally?

MR. GREEN: I would suggest that, Your Honor, one possibility would be for you to just issue declaratory relief consistent with paragraph 2 of the 1995 stipulation. That would be one way. That is, you know, a, that's, that kind of medicine is not as strong as a permanent injunction.

[55] Another would be for Your Honor to, and we'll get to the qualified immunity in a minute and why that may or may not be important, another would be for you to issue permanent injunctive relief as it relates to any kind of political and theatrical expression that contains a anti-war message, because that's what's going to happen on February 14th. There's still a war going on in Iraq and my client intends to put on another protest there.

THE COURT: Okay.

MR. GREEN: And so there is a continuing controversy that would—especially given the history of Ms. Wynet and the park.

THE COURT: It's clear she intends to keep doing this and I don't know that the decision has to rest on her I guess future as yet undefined intent as to demonstrations.

MR. GREEN: Well, she has indicated—

THE COURT: Otherwise, we just take the history, I mean, it's almost like saying, well, they stipulated before, so it's got to run on in perpetuity, and I'm not sure that is a fair reading of the law.

MR. GREEN: Well, Your Honor, we do have papers before you indicating, I guess maybe we need to separate this from, you know, kind of Article III [56] standing, there's clearly Article III standing, an ongoing controversy, a history of arrest, not only Ms. Wyner but other people, so from an Article III standpoint she has, based on the prior history, established a case or controversy, she has indicated in her verified complaint that she intends to engage in similar expression in the future, and based upon that we believe that either declaratory or hopefully permanent injunctive relief would be appropriate.

THE COURT: I understand your position on that. I guess I am asking, if I disagree with you on that and deal with it in the statute, that they can enforce their bathing suit ban on an across-the-board basis, not trying to pick and choose between types of plays or expressions, but if they can enforce their bathing suit ban, how procedurally should I deal with the preliminary injunction that was already entered?

MR. GREEN: Well, I believe, Your Honor, and we don't think it would be appropriate in this case—

THE COURT: I know you don't agree with it, but I am just trying to get both of your advice on how to deal with it if that were to be the—

MR. GREEN: To say that the preliminary injunction expired and declaratory relief is appropriate and if there are future disputes based upon the [57] declaratory relief that the Court can retain jurisdiction to consider, you know, future disputes.

THE COURT: Okay. Thank you.

MR. GREEN: With respect to, and if I may confer with Mr. Marshall, to see if he has anything additional. With respect to qualified immunity, Judge, our response to their motion I think sets forth our position. We think that there's a real problem here with discretionary function. Mr. Coullitte candidly admitted at deposition that he didn't think there was a problem.

Your Honor remembers his first response to Ms. Wyner saying he didn't think there would be a problem, that they could work together cooperatively, and then he was told it wasn't his decision, it was going to be made from, by someone higher up, and someone higher up made the decision. He was not performing a discretionary function.

THE COURT: Well, he has one, though. I mean, is that, is the problem you sued the wrong person then? Why wouldn't he still be entitled to qualified immunity because he has a, I guess his position at least has the discretion, if he let the lawyers tell him what to do, does that open him up to liability greater than he would otherwise have?

[58] MR. GREEN: Well, if, actually it does, I mean we believe that if you are just following orders that that is not a defense, and that is all he said he did. He didn't prepare the letter, he didn't even write the letter that was sent to Ms. Wyner saying, well, forget what I said earlier, you cannot perform your protest in the nude.

THE COURT: Well, somebody has a discretionary position somewhere up the line and assuming that person, there wasn't a clear legal rule, clearly established legal rule, then why isn't qualified immunity available?

MR. GREEN: Because it only applies to officials performing discretionary functions and he has indicated at deposition that he was not performing any kind of discretionary function. And if you are just following orders, I mean ultimately the real question is, you know, who, with, if Your Honor, we have the damages claim, albeit a nominal damages claim in there, one of the reasons is to prevent mootness. We want this case to be decided.. I can't be any more candid than that.

THE COURT: Okay.

MR. GREEN: However, we do believe that this is entirely appropriate for denial of qualified immunity.

[59] THE COURT: On this following order theory? Has that been accepted anywhere, essentially following an order?

MR. GREEN: Yes. And there's also a case, I believe following hospital regulations is not a defense, and that's out of the Tenth Circuit I know, and here following orders, there have been a number of cases where just because the supervisor in a police context orders you to use excessive force—

THE COURT: Well, it's not a defense but this is, did it vitiate qualified immunity, what you are saying is it does away with it.

MR. GREEN: Right.

THE COURT: If he made that decision on his own, in a case where he made the decision on his own he would be entitled to it. Is there any argument that because somebody up the line told him to do it that he loses it?

MR. GREEN: We believe that if he, he said he didn't have the discretion, he had to pass this on up the chain of command and they made the entire decision, and, you know, this, no one ever really pays, the courts haven't paid much attention to prong one of qualified immunity, there's actually prong one and prong two, prong one was was he performing a discretionary [60] function, if he wasn't then you don't even get to, you know, was, did he violate a constitutional right and, if so, was the right clearly established, you don't get to that, the second prong.

The first prong is was he performing a discretionary function. The undisputed evidence in this case is he was not. I have never had a case like this before but that's how it came out at deposition.

THE COURT: Okay, thank you.

All right, Mr. Williams, let me ask you the procedural question that I asked Mr. Green just in terms of that injunction, the preliminary injunction. If I were to agree with you on the facial challenge, how would the injunction, but I believe they're the prevailing party with respect to the injunctive relief at least as of when we entered it, although the reason, the driving force for issuing it was the content issue, which I'm not sure that stays there forever, assuming that we find then that you could enforce this general ban on nudity, how should we deal with a preliminary injunction issue?

MR. WILLIAMS: Well, I can't cite you any case law today, Judge. I didn't come here prepared to address that issue. But it's my impression that you have already granted the preliminary injunction and so [61] that's over.

Now, the purpose for an emergency temporary injunction and all of the problems attendent to that, i.e., you know, the State comes in on 18 hours notice and presents whatever evidence it can put together in those few hours—

THE COURT: A lot of times it's more candid. Isn't that the—

MR. WILLIAMS: Candor doesn't always equal completeness, with all due respect, and so for whatever reason, and I'm sure that based on the evidence that was there at that time the Court made its decision and that is over, if it's the Court's opinion, as it is our opinion, that the across-the-board ban on nudity is safe from constitutional challenge and may be applied across-the-board, then I think the remedy is to deny any further relief.

What the plaintiff seeks here now is to make that temporary ban permanent. That is what they want you to do. And I think, somebody correct me if I'm wrong, other than this less than twenty dollars worth of damages, that is all they wish you to do. They want you to declare that henceforth and forever more we cannot enforce the ban on nudity against Ms. Wyner.

That is inappropriate for some reasons we [62] talked about, for some reasons we haven't talked about, and if the Court feels that is appropriate then I think the way to proceed is to put all the preliminary issues behind us and deny the relief requested and all those things that go with it.

THE COURT: All right, thank you for your assistance. I believe, I don't think there's a need for—I don't see any material issues in dispute, at least that's our present thinking, so I think that we can deal with it or should deal with it on the summary judgment motions, and so at least for the present we are going to take it off the calendar for next week, and we will try to issue an order hopefully by the end of this week.

If you are able to settle it or resolve it that would be useful. If you both say you want a ruling, and if that's what you want, we'll do that. I think the plaintiffs, the prevailing party at least in terms of the preliminary injunction, I'm inclined at least to believe they can enforce a, their general ban on nudity

except in instances where they do take content into account, and it's not apparent to me that is what they're doing at present in trying to support their general ban, but I want to look over these, all these cases again, and we will enter an order hopefully by the [63] end of the week. But again let us know if you settle it, if there's a way for y'all to resolve it.

MR. WILLIAMS: Can we talk for just a minute sort of candidly about what we're going to do about the proposed upcoming event? And I'm not asking to have argument or ruling here, I'm not prepared for that, but we might—

THE COURT: Y'all can talk. I don't think I ought to participate in that. I don't know that, that is, my reaction is that I would rather just try to deal with the issue that is before me. Have y'all—y'all haven't dealt with this upcoming event yet, have you, in any fashion?

MR. WILLIAMS: That's correct.

MR. GREEN: Well, it was raised at the deposition by Ms. Wyner.

THE COURT: I mean she has announced that she intends to do this in the future, is that where we basically are?

MR. GREEN: Yes, Your Honor.

MR. WILLIAMS: There has been no formal discussion. She told us during her deposition, Judge, that she intended to do this thing this coming February. There has been no discussion about specific dates. We have had no formal notice. In fact, the most [64] full discussion I have heard of it was today.

We have explored the website, what is described there, not their website but another website that sort of works in conjunction with them, and what's described there doesn't look like what I am hearing about this morning, so I don't want anybody to be under the misinterpretation we have some

sort of formal notice unless what we have here today is formal notice.

THE COURT: My preference would be, I guess if I had a personal choice, it would be that y'all figure out some way to work it out, you know, and that you not, either side not push it to a final resolution. Sometimes I think those are the best answers. But I can understand why both of you might not be satisfied with that position.

I always think that forcing every issue to an ultimate judicial conclusion often isn't the best way to go. If things are left more fluid there's really a lot more room both for, sometimes for freedom, and also for the State to keep doing what it wants to do. But seems like more and more often that isn't the way things go these days. But I think there's a lot of advantages to that.

But in terms of trying to get into what she's going to do in the future, I would just as soon deal [65] with it on the record I have now and not participate in it. But again it seems to me it makes sense for y'all to talk and if you can resolve it, the case, that is great, if you can resolve what she wants to do in the future, that's wonderful too.

You did before in this settlement. The problem with those is I guess sometimes you get those hung around your neck forever.

Okay, have a good day.

(Hearing concluded.)

CERTIFICATE

I, Roger Watford, Official Court Reporter, do hereby certify that the foregoing transcript is true and accurate to the best of my knowledge, skill and ability.

Dated this 6th day of January, 2005.

/s/ Roger Watford
ROGER WATFORD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed JAN 28, 2004]

Case No. 03-80103-CIV-MIDDLEBROOKS/JOHNSON

T.A. WYNER and GEORGE SIMON,

Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERRENCE COULLIETTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Defendants.

FINAL JUDGMENT

THIS CAUSE comes before the Court pursuant to Fed. R. Civ. P. 58 and this Court's Order On Motions For Summary Judgment (DE 82), issued January 28, 2004, and for good cause shown. It is hereby

ORDERED AND ADJUDGED that Final Judgment shall be entered in favor of Defendants and against Plaintiffs upon the Complaint herein. The Court retains jurisdiction for the purpose of awarding costs and fees, including those expended on the Motion for Preliminary Injunction upon which Plaintiffs prevailed. It is further ORDERED, that the Clerk of Court shall CLOSE this CASE, and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers, at West Palm Beach, Florida, this 28 of January, 2004.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

copies to counsel of record